

No. 2012-5130

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

KLAMATH CLAIMS COMMITTEE,

Plaintiff-Appellant,

-v.-

UNITED STATES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF FEDERAL CLAIMS

Case No. 09-cv-00075 (Hon. Francis M. Allegra)

**ANSWERING BRIEF OF DEFENDANT-APPELLEE
THE UNITED STATES OF AMERICA**

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STATEMENT OF RELATED CASES

There has not been a previous appeal of this civil action before this Court or any other appellate court. However, there is a case pending in the U.S. District Court for the District of Columbia, *Nez Perce v. Salazar*, No. 06-CV-2239 (D.D.C.), which might directly affect or be directly affected by the Court's decision in this appeal. In *Nez Perce*, Plaintiff-Appellant has moved to intervene to seek, *inter alia*, injunctive relief requiring an accounting of the Litigation Trust Fund. In the motion to file a second amended complaint, the dismissal of which is challenged in this appeal, Plaintiff-Appellant sought the same injunctive relief (an accounting) as well as monetary remedies. Disposition of the issue in either case has the potential to affect both cases.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Klamath Claims Committee (“KCC”) filed suit against the United States in 2009, alleging a breach of fiduciary duty and a taking of property without just compensation in violation of the Fifth Amendment of the United States Constitution, based on the Department of the Interior’s alleged failure to: (1) pay reimbursement costs for a portion of an irrigation system located on the Klamath Reservation; and (2) safe-guard water rights associated with a dam. KCC’s complaint stated that it acts “on behalf of tribal members enrolled” in 1954 and asserted that the Court of Federal Claims (“CFC”) had jurisdiction pursuant to 28 U.S.C. 1505, for claims against the United States by an identifiable group of American Indians. A50.

On July 17, 2012, the CFC entered a final judgment dismissing all claims. A1. On August 13, 2012, KCC filed a timely notice of appeal. Fed. R. App. P. 4(a)(1)(B). The judgment is subject to review pursuant to 28 U.S.C. 1295(a)(3).

STATEMENT OF THE ISSUES

The United States and the Klamath Tribes¹ entered into a Treaty in 1864, which reserved to the Tribes approximately 800,000 acres held in trust by the United States. In 1954, Congress terminated federal supervision of the trust and restricted property of the Klamath Tribes and terminated federal services provided to the Klamath Tribes and its members based on their status as Indians. The 1954 Act required preparation of a final roll (“Final Roll”), and authorized each tribal member to elect whether to withdraw from the Tribes and receive a cash payment of the value of their per capita share of tribal property, or to choose to remain a member of the Tribes. In 1986, Congress restored federal recognition of the Klamath Tribes.

In the first amended complaint, KCC alleged that it represented the “tribal members enrolled at termination.” A50. It is undisputed that, in this lawsuit, KCC is not authorized to represent the Klamath

¹ The present-day Klamath Tribes is a single, federally-recognized tribal government that uses the plural “Tribes” to reflect the fact that it is composed of the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians. The CFC adopted the Tribes’ convention of referring to itself in the singular, *see* A20, as does this brief.

Tribes and does not represent all current members of the Klamath Tribes.

The issues on appeal are:

1. Whether the CFC correctly held that, for the claims against the United States brought by KCC on behalf of individual Klamath Indians who seek damages and just compensation for an alleged violation of water rights established by the Treaty of 1864 between the United States and the Klamath Tribes, the Klamath Tribes is an indispensable party.

2. Whether the CFC's denial of KCC's motion to file a second amended complaint, filed thirty-seven months after the filing of the first amended complaint and seeking to add new claims involving causes of action that do not arise out of the same operative facts, should be affirmed.²

STATEMENT OF THE CASE

KCC's first amended complaint, filed in March 2009, asserted four claims arising out of the Klamath Treaty of 1864 and the 1954

² The CFC dismissed KCC's motion as moot. The United States argues for affirmance on alternate grounds.

Termination Act. A50. The CFC dismissed as barred by the statute of limitations the first claim for a breach of trust, and the second claim for a taking based on the alleged failure of the Department of the Interior (“Interior”) to distribute funds pursuant to Section 13 of the 1954 Act. KCC has not appealed these rulings.

The third and fourth claims alleged: (1) a “taking of 1864 Treaty secured Reservation assets,” including “the elimination of storage water rights,” caused by Interior’s August 2008 removal of the Chiloquin Dam (A54-55); and (2) a breach of a fiduciary duty relating to Interior’s August 2008 “removal of the Chiloquin Dam and associated water rights.” A55. As relief for claims 3 and 4, KCC sought the replacement cost of the dam plus interest. A55-56. The CFC dismissed the third and fourth claims for failure to join an indispensable party, the Klamath Tribes.

In April 2012, more than 37 months after filing the first amended complaint, KCC moved to file a second amended complaint which sought to eliminate the first two claims, modify the third and fourth claims, and add three new claims arising out of different operative facts

and statutory provisions. A630-742. The CFC denied as moot the motion to amend. A22 n.22.

STATEMENT OF FACTS

A. Background

1. General History of the Klamath Tribes and the Klamath Reservation

The United States and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians entered into a treaty in 1864. *See* Treaty between the United States and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 707 (“1864 Treaty”). Through the Treaty, the Tribes relinquished its aboriginal claim to approximately twelve million acres of land in exchange for cash and goods worth approximately \$300,000. *See, e.g., United States v. Adair*, 723 F.2d 1394, 1398 (9th Cir. 1983); *Klamath and Modoc Tribes v. United States*, 13 I.C.C. 41, 42 (1964). Under the Treaty, the Tribes reserved its interest in approximately 800,000 acres as a reservation held in trust for the Tribes by the United States. *Id.* Article I of the 1864 Treaty gave the Tribes the exclusive right to hunt, fish, and gather on its reservation. 16 Stat. 707-08. Article II provided

funds to help the Tribes adopt an agricultural way of life. 16 Stat. 708; *Adair*, 723 F.2d at 1398.

From 1890 to 1920, Interior surveyed the Reservation for its irrigation potential and constructed irrigation facilities. One such facility was a diversion dam, the Chiloquin Dam. The Dam diverted portions of the Sprague River into canals that served lands near the Williamson River and Upper Klamath Lake. A4.

2. Enactment of the 1954 Act

In 1954, Congress terminated federal supervision over the trust and restricted property of the Klamath Tribes and its individual members, directed Interior to dispose of the federally-owned property acquired or withdrawn for the administration of the affairs of said Indians, and terminated federal services that had been provided based on their status as Indians or as a recognized tribe. Act of August 13, 1954, Ch. 732, § 1, 68 Stat. 718 (1954) (“1954 Act”) (codified at 25 U.S.C. 564-566h). The 1954 Act required preparation of a final roll of tribal members as of the date of enactment (Aug. 13, 1954). 1954 Act § 3, 25 U.S.C. 564b. Tribal members on the final roll, which consisted of 2133 individuals (the “1954 Members”), could elect to withdraw from the

Tribes and receive the cash value of their per capita interest in tribal property, or remain with the Tribes and participate in the tribal management plan for the remaining tribal property. *See* 1954 Act § 5(a)(2), 25 U.S.C. 564d; *see also Klamath and Modoc Tribes v. United States*, 436 F.2d 1008, 1010-11 (Ct. Cl. 1971).

To effectuate per capita payment to withdrawing members, the Act directed Interior to sell the portion of tribal property needed to generate the funds and distribute the money to the withdrawing members. 1954 Act § 5(a), 25 U.S.C. 564d. The Act stated that upon receipt of the money value of their interest in tribal property a person would cease to be a member of the Tribes, provided that “nothing shall prevent them from sharing in the proceeds of tribal claims against the United States.” 1954 Act § 6(c), 25 U.S.C. 564e(c).

Regarding members who chose to remain in the Tribes, the Act required the Secretary to “cause a plan to be prepared in form and content satisfactory to the tribe” for the management of tribal property through a trustee, corporation, or other legal entity, to which Interior would transfer title of all other tribal property. 1954 Act § 5 (a)(5) & 6(a), 25 U.S.C. 564d(a)(5), 564e(a). Tribal funds were to be used to pay

for the administrative costs incurred in the tribal property disposition process. 1954 Act § 5(b), 25 U.S.C. 564d(b). Disposition of tribal property was to be completed within four years. 1954 Act § 6(b), 25 U.S.C. 564e(b). Once all restrictions on the Tribes' property were removed, the Secretary was to publish a proclamation in the Federal Register declaring that the government-to-government relationship was terminated. 1954 Act § 18, 25 U.S.C. 564q.

Section 13 of the Act addressed issues relating to irrigation works on the Klamath Reservation. Section 13(a) authorized the Secretary to transfer the maintenance and operation of the irrigation works to a water user's organization. 1954 Act § 13(a), 25 U.S.C. 564l(a). Section 13(c) authorized to be appropriated "the sum of \$89,212 for payment to the Klamath Tribe with interest at 4 per centum annually," computed from the dates of disbursement from the Treasury, as "reimbursement for tribal funds used for irrigation construction operation and maintenance benefiting nontribal lands on the Klamath Reservation." 1954 Act § 13(c), 25 U.S.C. 564l(c).

The Act expressly stated that "[n]othing in this Act shall abrogate any water rights of the tribe and its members" and "[n]othing in this

Act shall abrogate any fishing rights or privileges of the tribe or its members thereof enjoyed under federal treaty.” 1954 Act § 14, 25 U.S.C. 564m.

3. Implementation of the 1954 Act

Following passage of the 1954 Act, approximately seventy-eight percent of the Tribes’ members (1,660 of 2,133) chose to withdraw. Interior used its authority under the 1954 Act to sell off much of the Tribes’ property to pay the withdrawing members. *Klamath and Modoc Tribes v. United States*, 436 F.2d 1008, 1010-13 (Ct. Cl. 1971). In response to the large number who chose to withdraw, and therefore the significant amount of property that needed to be sold, Congress twice amended the Act to extend the deadline for disposition of the Tribes’ property and termination of the trust relationship, and to modify the means for appraising and realizing the value of that property. *See Act of Aug. 14, 1957, Pub. L. No. 85-132, 71 Stat. 347 (codified at 25 U.S.C. 564 et seq.); Act of Aug. 23, 1958, Pub. L. No. 85-731, 72 Stat. 816 (codified at 25 U.S.C. 564 et seq.); see also Klamath*, 436 F.2d at 1011-13.

The Secretary subsequently disposed of enough property to compensate the withdrawing members and incorporated the remaining tribal property into the management plan; the tribal property was eventually transferred to a private trustee. *Klamath*, 436 F.2d at 1013; *Adair*, 723 F.2d at 1398. In 1961, the Secretary published a notice proclaiming the termination of federal supervision, effective August 13, 1961. *See* 26 Fed. Reg. 7,362; *Klamath*, 436 F.2d at 1013.

To fulfill the requirement of Section 13(c) of the 1954 Act regarding payment of \$89,212 plus interest at 4 percent annually as reimbursement for tribal funds used in irrigation construction, operation and maintenance, Congress appropriated the sum in Interior's 1956 fiscal year appropriations act. *See* Department of the Interior and Related Agencies Appropriation Act, 1956, Pub. L. No. 84-78; 69 Stat. 141, 143 (June 16, 1955). It took a number of years for Interior to transfer the irrigation facilities. Transfer of all right, title and interest of the United States in the Modoc Point Unit of the Klamath Irrigation Project to the Modoc Point Irrigation District (MPID) was completed in 1974. *See* 44 Fed. Reg. 12,192 (Mar. 6, 1979). The Chiloquin Dam is part of the Modoc Point Unit. A52 ¶ 10. In 1979,

Interior published a notice deleting all regulations pertaining to the irrigation system in light of the transfer of ownership to MPID. 44 Fed. Reg. 12,192.

4. Recognition of the Tribes' Treaty-Reserved Resource Rights and Restoration of Federal Recognition

Additional events are relevant to the water rights claims in the First Amended Complaint. First, three separate decisions by the Ninth Circuit Court of Appeals confirmed that the Klamath Tribes' rights to certain natural resources reserved by the 1864 Treaty continued to exist following the 1954 Act. *Kimball v. Callahan*, 493 F.2d 564, 566 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974) ("*Kimball I*") (treaty-reserved hunting, fishing and trapping rights on ancestral Reservation lands survived termination); *Kimball v. Callahan*, 590 F.2d 768, 776 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979) ("*Kimball II*") (treaty-reserved hunting, fishing, and trapping rights extend to descendants and the Tribes retains sovereign authority to regulate these rights); *Adair*, 723 F.2d 1394 (9th Cir. 1983) (implied reserved water rights to support the Tribes' reserved hunting, fishing, gathering, and agricultural rights survived termination of government-to-government relationship).

Second, in 1986, Congress restored the federal government's relationship with the Tribes. Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (Aug. 27, 1986) ("Restoration Act").

Specifically, the Restoration Act provided that

[a]ll rights and privileges of the tribe and the members of the tribe under any Federal treaty, Executive order, agreement, or statute, or any other Federal authority, which may have been diminished or lost under the [1954 Act] . . . , are restored, and the provisions of the [1954 Act], to the extent that they are inconsistent with this Act, shall be inapplicable to the tribe and to members of the tribe after the date of the enactment of this Act.

Restoration Act § 2(b), 100 Stat. 849. The Restoration Act also expressly stated that "[n]othing in this Act shall affect in any manner any hunting, fishing, trapping, gathering, or water right of the tribe and its members." § 5, 100 Stat. 850.

Third, the United States and the Tribes filed joint water rights claims as part of Oregon's adjudication of the Klamath River Basin on April 30, 1997. This adjudication (which remains ongoing as of the date of this filing) will quantify water rights recognized in *Adair* and held in trust by the United States for the Tribes. *See United States v. Braren*, 338 F.3d 971, 973-74 (9th Cir. 2003); *see also United States v. Oregon*, 44

F.3d 758 (9th Cir. 1994), *cert. denied sub nom. Klamath Tribes v. Oregon*, 516 U.S. 943 (1995).

5. Removal of Chiloquin Dam

In the late 1980s, Interior determined that the Chiloquin Dam and its fish ladder were adversely affecting several fish species listed as “endangered” under the Endangered Species Act (“ESA”). In 2002, Congress authorized a study to assess alternatives for improving fish passage at the Dam. *See* Pub. L. No. 107-171, § 10905, 116 Stat. 134, 537 (2002). After environmental review under the National Environmental Policy Act (“NEPA”) and the ESA, and consultation with the Tribes and MPID, Interior determined that removing the Dam was the best course of action.

In 2006, Interior and MPID negotiated a cooperative agreement under which Interior would pay for removal of the Dam and construction of an electric pump plant for irrigation. Removal was completed in August 2008. *See* A52 (Complaint ¶ 10).

6. The Klamath Claims Committee

On August 21, 1961, the Tribes’ governing body passed a resolution giving the KCC authority to pursue certain claims against

the United States on the Tribes' behalf. A5. In its Complaint in this case, KCC does not allege that it represents the Klamath Tribes. A51 ¶ 4. Instead, KCC purports to represent "tribal members enrolled at termination," *i.e.* the 1954 Members (A50 ¶ 2), whom it describes as "the senior members of the post restoration membership of the Klamath Tribes" (*id.* ¶ 4). The Complaint does not allege that KCC represents the non-1954 tribal members (*e.g.*, members born after August 13, 1954), whom it asserts have "no direct interest in the claims brought in this litigation." *Id.* ¶ 4. Although the Complaint does not allege that KCC represents descendants of the 1954 Members, some filings by KCC in the CFC assert that it represents descendants, including those who are not members of the Klamath Tribes and might not be members of any federally recognized tribe.³ Recent resolutions of the Klamath Tribes General Council assert that the KCC does not represent the 1954 Members and General Council Resolutions from 2012 show that a

³ See A392 (Dkt 46) ("The disenrolled Klamath Indians and their descendants comprise a large part of the 1954 Membership represented by the Claims Committee."); *see also* A178 n.5 (Dkt 13); A306 n.1 (Dkt 22); A389 (Dkt 46).

majority of the 1954 Members do not favor some of the relief KCC seeks in this appeal. *See infra* at 65-66.

B. Proceedings Below

KCC filed its initial complaint on February 6, 2009, and a first amended complaint on March 17, 2009. On May 7, 2009, the United States filed a motion to dismiss under RCFC 12(b)(1) and (6). The United States argued, *inter alia*, that: KCC lacked standing to bring these claims because it has no legally protectable interest in the property at issue; and KCC's claims accrued decades ago and are barred by the six-year statute of limitations. After briefing and a hearing on the United States' motion to dismiss, the CFC directed KCC to file an affidavit or resolution from an appropriate tribal official or officials addressing KCC's authority to file a claim in this matter. A328. KCC filed a letter from the Chairman of the Klamath Tribes stating that "[t]he Tribal Council simply is not, and I am not, in a position to lend support to litigation over which the Klamath Tribes have no control, particularly when the litigation may potentially affect Tribal rights of the entire General Council membership." A331.

1. CFC's First Opinion

On February 11, 2011, the CFC granted in part the United States' motion. It held that KCC's claims involving the reimbursement required by Section 13 of the 1954 Act accrued in 1961 and were barred by the six-year statute of limitations. A7. That ruling is not at issue on appeal.

Regarding KCC's claims that Interior's removal of the Chiloquin Dam in August 2008 effectuated a taking of water rights established by the 1864 Treaty and constituted a breach of fiduciary duties, the CFC stated that the claims appeared to be timely. A7. However, before addressing the United States' argument that the third and fourth claims fail to state a claim under RCFC 12(b)(6), the CFC held that it must resolve the preliminary issue whether, under RCFC 19, parties necessary to the resolution of the case must be joined. A7. The CFC concluded that the Tribes "are a party that should be joined to this action under RCFC 19(a)." A9. As the CFC noted, the "Tribes currently possess fishing and water rights that derive from the 186[4]Treaty," which are "essentially those same rights and fiduciary obligations" that KCC "seeks to vindicate in this case," and KCC has not been authorized

to pursue these claims on behalf of the Tribes. A9. The CFC concluded that disposing of the case in the Tribes' absence may, as a practical matter, impede the Tribes' ability to protect that interest or leave the United States subject to inconsistent obligations, because the United States would be vulnerable to claims by the Tribes for remuneration for the same alleged loss of water rights. A9.

The CFC determined that the appropriate process was to extend an invitation to the Tribes to intervene in this case under RCFC 24. A10. If the Tribes declined that invitation, the CFC would determine whether the Tribes is an "indispensable" party under RCFC 19(b). A10.

2. The Tribes' *Amicus* Brief and KCC's Motion to File a Second Amended Complaint

On April 20, 2011, the Tribes responded to the CFC's invitation and declined to intervene. A361; A17. The Tribes stated that it has "an interest in the remaining subject matter of this lawsuit" and that "disposing of this case in the Tribes' absence may, as a practical matter, impede the Tribes' ability to protect that interest." A361; A17. The Tribes further asserted that KCC "has no authority to speak for or represent the Tribes." *Id.*

On September 26, 2011, the parties filed briefs addressing RCFC 19(b). On November 7, 2011, the Klamath Tribes filed an *amicus* brief in which it declared the water rights at issue to be ones “that belong to the Tribes” and asserted that the KCC is “acting hostilely to the Tribes, asserting control over tribal rights, and inviting this Court to de-legitimize the Tribes.” A17.

On April 24, 2012, nearly nine months after retaining new counsel and more than thirty-seven months after filing the First Amended Complaint, KCC moved for leave to amend the complaint to: (1) remove the first two claims, (2) “clarify the facts” relating to the third and fourth claims, and (3) add three new claims relating to the Interior’s allegedly unlawful denial of KCC’s “access to the Litigation Trust Fund for the purpose of paying Plaintiff’s attorneys” and other aspects of its management of the Fund. A630-32 (motion); *see also* A650-56 (proposed new claims). KCC’s motion stated that the circumstances giving rise to the new claims “did not become known until recently, when [Interior] refused to allow Plaintiff to access the Litigation Trust Fund for the purpose of paying Plaintiff’s attorneys without the approval of the Restored Tribe.” A633. KCC’s motion acknowledged that the new

claims would extend the nature of the existing claims “to include an additional trust asset” and that an “alternative to amending Plaintiff’s petition would be to file a new action addressing the Litigation Trust Fund.” A633. The United States opposed KCC’s motion on grounds that KCC unduly delayed moving to add new claims and that amendment would be futile because the new claims would not survive a motion to dismiss. A775-93 (Dkt 58).

3. CFC’s Second Opinion

On July 16, 2012, the CFC held that the Tribes is an indispensable party under RCFC 19(b) for KCC’s claims seeking to “safeguard treaty-based water rights associated with” the Chiloquin Dam. A14. The CFC stated that the Tribes’ interest in the 1864 Treaty-reserved water rights might be impaired because resolution of KCC’s claims would require the court to determine the scope, ownership, and value of the water rights, which – on appeal – could result in binding adverse precedent on an issue in which the Tribes has a non-frivolous sovereign interest. A19. As the CFC explained, “Plaintiff and the Tribes, whose memberships are different, assert at least partially overlapping claims to those rights.” A19. “While

plaintiff and the Tribes dispute the precise contours of the other's membership, they both agree that an award to the other would provide a windfall to unentitled individuals while denying certain entitled individuals a share." A22 n.19. The court recognized that, if the Tribes had intervened, it "would have been forced to determine how to allocate any resulting judgment, requiring it to wade into disputes not only between the claimants and the United States, but also among the claimants themselves." A22 n.19. It further determined that any disposition in the Tribes' absence "threatens to leave defendant subject to multiple and competing claims" for compensation. A19. The CFC concluded that a majority of the factors in RCFC 19(b) weighed heavily in favor of finding that the Tribes is a necessary and indispensable party that cannot be joined in the action because of its sovereign immunity, compelling dismissal. A20.

In a footnote, the CFC stated that "[b]ecause of this ruling, the court will deny, as moot, a motion filed by plaintiff to amend its complaint." A22 n.22. On July 16, 2012, the CFC entered an order (*see* Dkt between entry 60 and 61 (A24)) denying as moot KCC's motion to

amend the pleadings. On July 17, 2012, the CFC entered a judgment dismissing the complaint and awarding no costs. A1.

SUMMARY OF ARGUMENT

The CFC correctly held that the Klamath Tribes is an indispensable party in this action in which an organization, on behalf of unidentified individuals who were members of the Klamath Tribes in 1954, seeks compensation from the United States for alleged harm to water rights secured by the 1864 Treaty between the Klamath Tribes and the United States. In direct opposition to the Tribes' asserted interests, KCC alleges that the 1954 Members own the Treaty-reserved water rights exclusively. KCC seeks to have the CFC determine the scope and value of the water rights allegedly harmed and direct the United States to pay damages and/or compensation to KCC. The Tribes, on behalf of itself as a governmental entity and all its members (not just some subset that KCC asserts it represents), claims that it owns the water rights reserved by the 1864 Treaty. Thus, KCC and the absent Klamath Tribes, which cannot be joined because of sovereign immunity, assert competing interests in the same resource.

The CFC correctly held that the Tribes is a required party under Rule 19(a). In adjudicating the merits of KCC's claims, the CFC (and perhaps ultimately this Court) would need to determine the scope, ownership, value, and associated fiduciary obligations deriving from the Treaty. A ruling on those issues could, as a practical matter, prejudice the Tribes' interest, which would not be represented by the United States in this lawsuit. The United States would be opposing here, as it would in any subsequent suit by the Tribes, the argument that its actions have harmed or diminished the scope of any Treaty-reserved water right. Thus, the Tribes is a required party under RCFC 19(a)(2)(i).

While it is sufficient to satisfy just one of the Rule 19(a) provisions, a ruling on the merits also would leave the United States subject to a substantial risk of incurring multiple, inconsistent obligations for the same alleged harm, with little prospect for recovering damages later found to have been improvidently awarded to KCC. Thus, the Tribes likewise is a required party under RCFC 19(a)(2)(ii).

The CFC also reasonably exercised its discretion in determining, under RCFC 19(b), whether "in equity and good conscience" the action

should proceed in the Tribes' absence. The first factor under RCFC 19(b) – prejudice to the absentee and current parties – is largely reflected in the Rule 19(a)(2) analysis. The potential prejudice to the Tribes and risk of multiple or conflicting judgments against the United States regarding the scope, ownership, and value of Treaty reserved water rights applies with equal force under RCFC 19(b). KCC asserts that the CFC erred in concluding that disposing of the action could impair or impede the Tribes' interest because the Tribes “can assert no legally protectable interest in Plaintiff's claims.” Br. 50. But the question before the CFC was not whether the Tribes *has* an interest in KCC's *claims* but whether the Tribes “*claims* an interest relating to the *subject of the action*.” RCFC 19(a)(1)(B) (emphasis supplied). The Tribes is an indispensable party precisely because it and KCC claim the same (or substantially overlapping) interests in the same water rights – and the CFC correctly declined to determine the merits of those claimed interests in undertaking its Rule 19 analysis.

KCC's second challenge to the CFC's Rule 19 analysis is likewise unavailing. KCC argues that the CFC failed to properly consider the United States' sovereign interest in having the Treaty and statutory

rights upheld and gave undue weight to consideration of a lesser sovereign's interests. To the contrary, the CFC correctly considered prejudice to the United States from the risk of multiple and or conflicting judgments and, likewise, properly considered the Tribes' sovereign interests. KCC cites no authority for its novel theory, which is contrary to the extensive case law dismissing actions under Rule 19 for failure to join a Tribe. Moreover, the defendant in this case, not KCC, is properly situated to represent the United States' sovereign interests. KCC has not alleged any error in the CFC's consideration of the other three factors, or asserted that the prejudice could be lessened by shaping the relief in a judgment. The CFC's ruling dismissing the complaint under Rule 19 should be affirmed.

This Court also should affirm the CFC's dismissal of KCC's motion, under RCFC 15, to file a second amended complaint. While we agree with KCC that the motion was not moot, KCC's motion to amend is unduly delayed, futile, would cause undue prejudice by protracting this lawsuit, and would not serve judicial economy. Even assuming that amendment would not be futile, KCC has utterly failed to meet its burden of demonstrating that dismissal of the motion works an

injustice. The proposed new claims, which KCC sought to add more than 37-months after filing the first amended complaint, should be pursued (if at all) in a separate lawsuit.

STANDARD OF REVIEW

A. RCFC 19

This Court has not determined the standard of review for RCFC 19 determinations. *See United Keetoowah Band of Cherokee Indians v. United States*, 480 F.3d 1318, 1324 (Fed. Cir. 2007). But RCFC 19 is “virtually identical” to Fed. R. Civ. P. 19, and this Court has relied on cases interpreting FRCP 19 in analyzing RCFC 19. *Id.* at 1323 n.2.

In *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 863-64 (2008), the Supreme Court did not decide the appropriate standard of review but described the inquiry under Rule 19 as “case specific,” “based on equitable considerations” and an evaluation of “multiple factors.” “[T]he direction to consider whether ‘in equity or good conscience’ the case should proceed, implies some degree of deference” to the lower court. *Id.*

A Rule 19 determination should be reviewed under an abuse of discretion standard. *See, e.g., Northern Arapaho Tribe v. Harnsberger*,

697 F.3d 1272, 1277 (10th Cir. 2012); *Jimenez v. Rodriguez-Pagan*, 597 F.3d 18, 24 (1st Cir. 2010); *Cachil Dehe Band of Wintun Indians v. California*, 536 F.3d 1034, 1040 (9th Cir. 2008); see also *National Union Fire Ins. Co. v. Rite Aid*, 210 F.3d 246, 250 n.7 (4th Cir. 2000) (describing standards applied in various circuits). Rule 19 “calls for a pragmatic decision based on practical considerations in the context of particular litigation” and the lower court has “substantial discretion in considering which factors to weigh and how heavily to emphasize certain considerations in deciding whether the action should go forward.” *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1495 (D.C. Cir. 1995) (internal quotations omitted); *ConnTech Development Co. v. University of Connecticut Educ. Properties, Inc.*, 102 F.3d 677, 682 (2^d Cir. 1996) (review for abuse of discretion because Rule 19(b) leaves the court great latitude, and requires a factual determination). In making a Rule 19 determination, a court abuses its discretion if it fails to consider a relevant factor, relies on an improper factor, or relies on grounds that do not reasonably support its conclusion. *Northern Arapaho*, 697 F.3d at 1277. In general, “[t]o constitute an abuse of discretion, a court must either make a clear error of judgment in weighing relevant factors or

exercise discretion based upon an error of law.” *DGR Assoc., Inc. v. United States*, 690 F.3d 1335, 1340 (Fed. Cir. 2012).

B. RCFC 15

The denial of a motion to amend the complaint is reviewed for abuse of discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Foman v. Davis*, 371 U.S. 178, 182 (1962). In this appeal, no party seeks to defend the denial of KCC’s motion as moot. There are, however, alternate grounds for affirming denial of the motion. Where the lower court has not provided any explanation for its disposition of a motion to amend, or has provided an incorrect basis for its ruling, this Court (as have other Courts of Appeals) can apply the relevant factors. *See Te-Moak Bands of W. Shoshone Indians of Nev. v. United States*, 948 F.2d 1258, 1261-64 (Fed. Cir. 1991) (finding abuse of discretion in allowing amendment of pleadings, even though lower court included no analysis of applicable factors); *Cultor Corp. v. A.E. Staley Mfg Co.*, 224 F.3d 1328, 1332-33 (Fed. Cir. 2000) (lower court denied motion to amend without comment but futility of proposed amendment is apparent “and is adequate grounds for the denial of leave to amend”); *Mayeaux v. Louisiana Health Serv.*, 376 F.3d 420, 426-27 (5th Cir. 2004)

(lower court's failure to adequately explain basis for its denial is unfortunate but not fatal to affirmance if record reflects ample and obvious grounds for denying leave to amend); *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 773-74 (7th Cir. 1995) (affirming on alternate grounds dismissal as moot a motion to amend – without resolving question of mootness – where record showed undue delay).

ARGUMENT

I. THE CFC PROPERLY APPLIED THE RULE 19 ANALYSIS TO KCC'S CLAIMS RELATING TO LOSS OF TREATY-SECURED WATER RIGHTS

A court may consider *sua sponte* the absence of a required person, as it did here, and dismiss for failure to join. *Pimentel*, 553 U.S. at 861. The CFC properly applied the Rule 19 analysis to KCC's claims for compensation for alleged damage to Treaty-secured water rights caused by removal of the Chiloquin Dam. A56.

A. The CFC Correctly Determined that the Tribes is a Required Party

Pursuant to Rule 19(a), a party is a “required” party if any of three circumstances exist: (1) “in the person's absence complete relief cannot be accorded among those already parties, *or* (2) the person claims an interest relating to the subject of the action and is so situated that the

disposition of the action in the person's absence may" either (i) impair or impede the person's ability to protect that interest *or* (ii) leave an existing party "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." RCFC 19(a) (emphasis supplied). The Tribes is a required party under Rule 19(a)(2)(i) and (ii).

1. A ruling on the merits could impair the Tribes' ability to protect its claimed interest in the Treaty-secured water rights

Under RCFC 19(a)(2)(i): an absent party's claimed interest in the subject matter of the underlying action must be of "such a direct and immediate character that the [absent party] will either gain or lose by the direct legal operation and effect of the judgment." *Keetoowah*, 480 F.3d at 1325 (citing decisions on nature of the "interest" under Fed. R. Civ. P. 19(a)); *see also Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (absent party's claimed interest must be a significant legally protectable interest that is "more than a financial stake" and "more than speculation about a future event") (cited with approval in *Keetoowah*). The Tribes has claimed such an interest in the Treaty-secured water rights.

In this suit, KCC claims (on behalf of some ill-defined subset of the Tribes, which KCC suggests might also include non-Tribal members) exclusive ownership of a portion of the water rights reserved for the Tribes in the 1864 Treaty. The Tribes claims that it (but no non-Tribal members) have exclusive ownership of the Treaty-secured water rights. A588-95 (Dkt 53, Tribes' *Amicus* Brief). In adjudicating the merits of KCC's third and fourth claims, the CFC (and perhaps ultimately this Court) would need to determine the scope, ownership, value, and associated fiduciary obligations deriving from the Treaty-secured water rights. A ruling on those issues could, as a practical matter, prejudice the Tribes' interests, which would not be represented by the United States in this lawsuit. Although the United States and the Tribes are jointly pursuing the scope of the Tribes' water rights in the State of Oregon's Klamath River adjudication (*see supra* at 12-13), here the United States' interests would not be aligned with the Tribes.' Rather, the United States would be opposing here, as it would in any subsequent suit by the Tribes, any argument that its actions have harmed or diminished the scope of any Treaty-reserved water rights. A ruling by this Court on the scope, ownership, value, and fiduciary

obligations relating to the impact of the removal of the Chiloquin Dam would make it difficult not to impair the Tribes' claimed interests in the same rights.

KCC argues that the CFC "improperly conflated the distinct statutory rights of the final enrollees with the separate sovereign rights of the newly restored Tribe" and erred by failing to consider "the statutory bases" of KCC's claims. *See* Br. 26; *see also* Br. 27 (arguing that its claims arise under federal legislation). Although the opening brief repeatedly refers to "statutory rights," KCC's Complaint does not describe *statutory* water rights allegedly taken or harmed by removal of the Chiloquin Dam or identify any statutory provision allegedly violated.

On appeal, KCC appears to argue that the water rights it seeks to assert are statutory rights given to the 1954 Members in Section 13 of the 1954 Act. To the extent that KCC is now trying to recast Claims 3 and 4 as seeking relief under the 1954 Act for damages to statutory water rights, it has waived the argument by failing to include it in the Complaint and assert it below. The Complaint, to which the CFC applied the RCFC 19(a) analysis, described the water rights as Treaty-

based, not statutorily created. See A55 ¶ 22 (alleging that Interior had taken (in violation of the Fifth Amendment) and failed to protect (in violation of its fiduciary duty), “1864 Treaty-secured” water rights, which are “Reservation assets” preserved “for the benefit of the 1954 tribal membership and the 1954 terminated tribe”). Thus, the Complaint identified the water rights as Treaty-reserved rights and acknowledged that the 1954 Act preserved those rights (at least in part) for the Tribes.⁴

⁴ In any event, any claim for compensation owed under the 1954 Act would need to have been filed within six years of the termination of the government-to-government relationship in 1961. See 28 U.S.C. 2501. This lawsuit was filed in 2009. Moreover, any such claim would be meritless. The compensation paid to the withdrawing 1954 Members included the value of the land with the Chiloquin Dam in place. Providing the withdrawing members additional value would constitute double recovery. Regarding the non-withdrawing members, any tribal property rights that remained with the Tribes after payment to the withdrawing 1954 Members continues to be held by the Tribes; and it is uncontroverted that, in this litigation, KCC does not represent the Tribes’ interests. Compare Br. 34 (stating that KCC’s right to bring tribal claims was limited to “tribal claims for harms arising before August 27, 1986”); with Br. 41 (tribal claims for harms arising after August 27, 1986, “remain the exclusive and sovereign prerogative of the restored Tribe”); Br. 47 (same). KCC’s assertion that it *may* continue to bring tribal claims “for harms arising *before*” August 27, 1986 (Br. 41), fails to acknowledge that such claims are barred by the six-year statute of limitations in 28 U.S.C. 2501. See, e.g., A7.

(cont’d)

KCC's argument that the 1954 Act vested the Treaty-reserved water rights in the 1954 Members (including individuals who are not members of the Tribes) – and that the Tribes either has no interest or a reduced interest in the water rights – poses a direct conflict with the Tribes' claim to the water rights as a Treaty right that belongs solely to the Tribes and its members.⁵ As the CFC correctly determined,

It is unclear exactly what water rights are associated with removal of the Chiloquin Dam and on whose behalf KCC is asserting that the United States breached a trust duty or violated the Fifth Amendment for taking water rights without just compensation. Those problems prompted the United States to move for dismissal for lack of standing and for failure to state a claim under RCFC 12(b)(6). But dismissal likewise was warranted on the basis that the Tribes claim an interest in the water rights on its Reservation – rights which are at issue in the State of Oregon's Klamath River Basin adjudication – and that a determination of the scope of any water rights lost by removal of the Chiloquin Dam, and damages owed by the United States: (1) will impede the Tribes' ability to protect its interest in the scope of its water rights; and (2) might subject an existing party (the United States) to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations for damages.

⁵ At one point, the opening brief acknowledges the Tribes' interest in the water rights, stating that the 1954 Act identifies the water rights as "tribal property." Br. 35. Similarly, in its response to the United States' motion to dismiss, KCC stated that it is "asserting communal claims" (A181), concerning "a prominent tribal interest in removal of the Dam – focusing on Tribal treaty protected fishing and other recreation and historic rights and interests." A202.

adjudicating the issue of the scope of any water rights of the 1954 Members that have been lost or affected by removal of the Chiloquin Dam, without the Tribes present, would, as a practical matter, impair or impede the Tribes' ability to protect the scope of its Treaty-reserved water rights. *Northern Arapaho*, 697 F.3d at 1279 (determination of the Indian country status of lands, in tribe's absence, would, as a practical matter, impair or impede tribe's ability to protect that interest).

In determining that the Tribes is a required party under RCFC 19(a), the CFC did not either assume or determine that the Tribes *has* an interest in the water rights.⁶ Rather, without deciding the merits, the court correctly recognized that the Tribes *asserts* a non-frivolous, direct interest relating to the subject of the action.

⁶ KCC asserts that the CFC “presumed, without examination, that the rights Plaintiff sought to enforce belonged to the restored Tribe.” Br. 26. That is incorrect. The CFC did not presume that the Treaty-reserved water rights belong to the Tribes. As the CFC expressly noted, the standard in RCFC 19(a)(2) “does not require the absent party to actually possess an interest,’ but merely requires that the absentee claim such an interest.” A8 (quoting *Davis v. United States*, 192 F.3d 951, 958 (10th Cir. 1999)). Nor, in making the Rule 19 determination, did the CFC assume or determine the scope of the 1954 Members' water rights, as KCC appears to now urge that it should have. Br. 47-48 (arguing that KCC's interests are “exclusive of the cognizable interests of the restored Tribal sovereign”).

Contrary to KCC's contentions (Br. 30-33), the CFC's analysis is consistent with this Court's decision in *Keetoowah*. There, the Court held that the non-party did not have an "interest relating to the subject" of the action. The subject of the action was the "statutory extinguishment of the [plaintiff's] claims by the government" in a Settlement Act of 2002, not – as the CFC had concluded – a claim to rights in the Riverbed Lands themselves. *Keetoowah*, 480 F.3d at 1326. The Court in *Keetoowah* further held that the non-party's reversionary interest in the special holding account did not constitute an "interest" in the subject of the action because any interest was "contingent rather than direct"; the non-party's interest was contingent on resolution of claims like the United Keetoowah Band's. 480 F.3d at 1327 n.6.

By contrast, KCC's Complaint asserts an interest in the Treaty-reserved water rights themselves. Any water rights KCC claims overlap with, and therefore conflict with and implicate, the Tribes' water rights. Accordingly, the CFC did not err in finding that the Tribes is a required party under RCFC 19(a)(2)(i).

2. Disposition of KCC's claims, in the absence of the Tribes, would leave the United States subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations relating to the impact of the Chiloquin Dam removal on Treaty - secured water rights

RCFC 19(a)(2)(ii) recognizes the need for considering, in the alternative, whether an existing party may be left, after the adjudication, in a position where a person who claims an interest in the subject of the action – but is not joined – can subject an existing party to multiple or otherwise inconsistent liability. KCC and the Tribes claim interests in the same water rights. Although the United States believes that KCC's claims are meritless, that is not relevant to the analysis under Rule 19. If KCC were to prevail on its claims that the United States has impaired water rights that KCC owns, and the Tribes subsequently pressed similar claims for damages, the United States would be subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations for the same alleged harm, with little prospect for recovering damages later found to be improperly awarded to KCC. Thus, as the CFC correctly stated in its Rule 19(b) analysis, “any disposition in the Tribes’ absence threatens to leave defendant

subject to multiple and conflicting claims with respect to the same fishing and water rights conferred by the 1864 Treaty” because KCC and the Tribes assert “at least partially overlapping claims to those rights.” A19.

B. The CFC Correctly Determined that the Tribes is an Indispensable Party

Under RCFC 19(b), if a person who is required to be joined if feasible (pursuant to RCFC 19(a)), cannot be joined, “the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.” RCFC 19(b). The Rule states that the factors for the court to consider “include: (1) the extent to which a judgment rendered in the person’s absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person’s absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.” RCFC 19(b). These four factors – also included in Federal Rule of Civil Procedure 19(b) – are not rigid, technical tests, but rather “guides to the overarching ‘equity and good

conscience' determination." *Cloverleaf Standardbred Owners Ass'n v. National Bank*, 699 F.2d 1274 , 1279 n.11 (D.C. Cir. 1983); *see also Pembina Treaty Comm. v. Lujan*, 980 F.2d 543, 545 (8th Cir. 1992).

KCC states that the CFC correctly noted that KCC would have no adequate remedy if the complaint was dismissed. Br. 49. KCC also acknowledges (Br. 49-50) that the CFC relied on several countervailing considerations (A19), including: the Tribes' sovereign immunity and its assertion of a significant legally protectable interest that would be impaired by an adverse ruling; the threat of multiple and conflicting claims against the United States with respect to the same fishing and water rights conferred by the 1864 Treaty; and the United States' inability to adequately represent the Tribes' interests because it will be defending against any obligation to pay compensation (to KCC or the Tribes) for an alleged failure to adequately protect and preserve water rights.

KCC nonetheless asserts that the CFC erred in two respects. KCC argues that disposing of the action in the Tribes' absence cannot impair or impede the Tribes' ability to protect its interests because the Tribes "can assert no legally protectable interest in Plaintiff's claims." Br. 50.

KCC next argues that the CFC failed to properly consider Congress's interests and improperly gave weight to the Tribes' sovereignty. KCC's arguments are flawed and do not show that the CFC abused its discretion in applying the factors.

1. The CFC did not abuse its discretion in finding that a judgment, without the Tribes present, would likely prejudice the Tribes and the United States

The first factor (prejudice to the absentee and current parties) is largely reflected in the Rule 19(a)(2)(i) examination into impairment of a significant legally protectable interest. *See Northern Arapaho*, 697 F.3d at 1282 (the "prejudice test" is essentially the same as the inquiry under Rule 19(a)(2)(i)); *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 479 (7th Cir. 1996) (same); *Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir 1999) (same). For the reasons stated above (*see supra* at 29-37), the Tribes and the United States would be prejudiced if the case were to proceed in the Tribes' absence.

KCC's claims are based on alleged harms to water rights derived from the 1864 Treaty to which only the Tribes and the United States are signatories. Courts have generally found that where a plaintiff seeks to litigate treaty rights without all the signatory tribes to the

relevant treaty, the absent tribes are indispensable and the claim must be dismissed. *See, e.g., Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) (finding prejudice would result to absent treaty-tribes because harvest reallocation sought by litigating tribe necessarily detrimental to absent tribes); *cf. United States v. Washington*, 520 F.2d 676, 688 (9th Cir. 1975) (“treaties must be viewed as agreements between independent and sovereign nations. . . . Each tribe bargained as an entity for rights which were to be enjoyed communally.”); *Whitefoot v. United States*, 293 F.2d 658, 661-63 (Ct. Cl. 1961) (alleged damage from dam construction to treaty-reserved right is recoverable only by tribe, not by individual tribal members). Furthermore, as explained *supra*, KCC’s claims concerning the Treaty-reserved water rights expose the United States to the prospect of double or multiple payment and conflicting obligations, absent resolution by the court in the judgment of what entity has (and does not have) a beneficial interest in the Treaty-reserved water rights.

KCC argues that disposing of the action in the Tribes’ absence cannot impair or impede the Tribes’ ability to protect its interests because the Tribes “can assert no legally protectable interest in

Plaintiff's claims." Br. 50. KCC misapprehends the Rule 19 inquiry. The question before the CFC was not whether the Tribes *has* an "interest in Plaintiff's *claims*" (Br. 50, Br. 52, emphasis supplied) but whether the Tribes "*claims* an interest relating to the *subject of the action.*" RCFC 19(a)(1)(B) (emphasis supplied).

As the Ninth Circuit observed, the argument that the Court must make a determination as to the legal rights of the absent party in making a Rule 19 determination is "not without some logical appeal" – if the absent party's legal position is wrong, then it has no legally protectable interest in the outcome of the action. *Shermoen v. United States*, 982 F.2d 1312, 1317-18 (9th Cir. 1992). But the language of Rule 19 forecloses such an approach. Under Rule 19, "the finding that a party is necessary to the action is predicated only on that party having a claim to an interest Just adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of th[e] party." *Id.*; see also *Keweenaw Bay*

Indian Community v. State, 11 F.3d 1341, 1347 (6th Cir. 1993) (same).⁷

As explained *supra*, the Tribes plainly does claim an interest in Treaty-reserved water rights on its own behalf as a governmental entity and on behalf of all of its members (including all living 1954 Members, who were automatically made members of the Tribes after the federal/tribal relationship was restored in 1986). And, KCC, in direct opposition to the Tribes' interest, claims that the Treaty-reserved rights are vested in the 1954 Members alone. Resolving the dispute on the merits prior to assessing whether the Tribes is an indispensable party, as KCC urges, would turn the Rule 19 analysis on its head. The Tribes is an indispensable party precisely because it and KCC claim the same (or substantially overlapping) interest, regardless of the legal merits of either party's arguments.⁸

This case does not present a situation where multiple parties possess shared, compatible interests. KCC claims that it holds the sole

⁷ Use of the term "person," rather than "party," might be clearer because these passages refer to a non-party to which the Rule 19 analysis is applied.

⁸ The United States notes its legal position that, on the merits, KCC is wrong: KCC does not hold an exclusive interest in Treaty-reserved water rights.

interest in these treaty rights and that the Tribes have no interest here. *See, e.g.*, A51 ¶¶ 3-5 (Complaint) (claiming to represent the “1954 tribal membership” and “1954 terminated tribe” and alleging that “[t]he non-1954 membership has no direct interest in the claims brought in this litigation”). The competing interests here are more akin to “[c]onflicting claims by beneficiaries to a common trust [that] present[s] a textbook example of a case where one party may be severely prejudiced by a decision in his absence.” *Wichita and Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 774 (D.C. Cir 1999). KCC seeks to litigate the extent of the 1864 Treaty water rights here, without the Tribes, which (jointly with the United States) is litigating the scope of the Tribes’ water rights in the ongoing Klamath Basin water rights adjudication.⁹ Here, the United States cannot represent the Tribes’ interests because, on the merits, the United States would vigorously argue (as it would in response to any similar claims by the Tribes) that its actions did not impair the Treaty-reserved water rights. And, as described *supra*, if

⁹ *See supra* at 12-13.

this case were to proceed, the United States could be subject to multiple inconsistent liabilities if the Tribes were to later bring suit and succeed.

Under the second factor, prejudice to both the United States and the absent Tribes cannot be avoided by careful drafting of any judgment. In order to award any monetary damages to KCC, the Court would need to determine the breadth of the Treaty water rights taken by the United States, or determine the value of the rights under a breach of trust theory. In other words, in valuing the rights, the Court would be deciding the extent of the Treaty rights in the Tribes' absence and at the behest of a group of individuals. *Cf. Keweenaw Bay Indian Community v. State*, 11 F.3d 1341 (6th Cir. 1993) (individuals cannot prosecute tribal rights).

The court could not separate out the KCC's Treaty-based claims and address them as a subset apart from the Tribes' rights because each entity claims exclusive rights. "There is no middle ground." *United States ex rel. Hall v. Tribal Development Corp.*, 100 F.3d 476, 480 (7th Cir. 1996) (citation omitted). KCC seems to recognize this as it

has not proposed any means of limiting the judgment to prevent prejudice to the Tribes or the United States.

There is no doubt that claims concerning the 1864 Treaty-reserved rights have been complicated by the termination and subsequent restoration of the federal/tribal relationship. Prior to restoration of the federal/tribal relationship, the Ninth Circuit in *Kimball I* held that withdrawn tribal members retained their treaty rights to hunt and fish. But, at the same time, the decision in *Kimball I* “expressly recognized that withdrawn members relinquished all interests in *tribal property*.” *Kimball v. Callahan*, 590 F.2d 768, 772 (9th Cir. 1979) (“*Kimball II*”) (describing its prior ruling in *Kimball I*) (emphasis added). The Ninth Circuit in *Kimball II*, which likewise was decided before the 1986 Restoration Act, held that the 1954 Act did not limit treaty hunting, fishing, and trapping rights to persons on the final roll but extended these rights to the descendants of persons on the final roll who had withdrawn from the Tribes. *Kimball II*, 590 F.2d at 776. *Kimball II* also recognized that the 1954 Act “specifically contemplated the continuing existence of the Klamath Tribe” (*id.* at 775-76) and reaffirmed the ruling in *Kimball I* that the 1954 Act “did not abrogate

tribal treaty rights” or “affect the sovereign authority of the Tribe to regulate the exercise of those rights” (*id.* at 776).

But the issue before this Court now is not who owns the rights – a matter that would require a decision on the merits of KCC’s claims. The issue addressed by the CFC and before this Court is whether a judgment entered in the Tribes’ absence might prejudice the Tribes’ interests in the Treaty-reserved water rights or prejudice the United States. The CFC correctly determined that the first two factors weigh in favor of dismissal of claims 3 and 4 in the Complaint. KCC’s arguments to the contrary erroneously seek to have this Court reach the merits in performing the Rule 19 analysis.

2. The CFC properly considered the Tribes’ sovereign immunity in conducting its Rule 19 analysis

KCC acknowledges (Br. 50) that tribal sovereign immunity is a factor that must be weighed in the RCFC 19(b) analysis, which the CFC did here. KCC then argues, however, that the CFC failed “to balance the interests of two differently weighted sovereigns: the restored Tribe claiming an interest in Plaintiff’s claims, and the United States Congress, which created and preserved the statutory rights of final enrollees.” Br. 52. KCC further asserts that “Congress has an interest

in seeing its laws enforced, just as it has an interest in exercising its plenary authority over Indian affairs.” Br. 52.

Interior is charged by Congress with interpreting and applying the federal statutes and Treaty rights at issue. In this lawsuit, Congress’s interests need not be considered separately from the defendant’s interests; and these interests are represented by the defendants, not by KCC. KCC cites no authority for its novel argument that it speaks for Congress’s interests. Moreover, KCC’s reasoning regarding the need to balance “differently weighted sovereigns” conflicts with all (or nearly all) cases that have found a tribe to be an indispensable party in actions involving alleged violations of federal law.

The CFC did not ignore the federal sovereign’s interests (as KCC asserts) but, rather, properly factored the Tribes’ sovereign immunity and the United States’ interests into its assessment of whether, in equity and good conscience, the action should proceed in the absence of the Tribes. The CFC correctly noted that “Courts generally afford sovereigns ‘heightened protection’ if a lawsuit poses ‘a potential of injury to the sovereign’s interest.’” A18 (quoting *Odyssey Marine*

Exploration, Inc. v. Unidentified Shipwrecked Vessel, 657 F.3d 1159, 1181 (11th Cir. 2011)). The CFC's recognition of the potential impact of an adjudication of the Tribes' sovereign interest aligns with, rather than frustrates, the United States' interests in having the scope of and/or alleged impact of the Dam on Treaty-reserved water rights determined in a forum where the Tribes is participating. Proceeding without the Tribes would expose the United States to the potential of conflicting or multiple adverse rulings. The CFC did not improperly fail to consider the federal government's interests – rather, it properly declined to resolve the merits, which KCC urges this Court to reach.

II. DISMISSAL OF KCC'S MOTION TO FILE A SECOND AMENDED COMPLAINT SHOULD BE AFFIRMED AS UNDULY DELAYED, FUTILE, AND OTHERWISE UNWARRANTED.

Rule 15 sets forth the circumstances under which a plaintiff may amend its complaint. A plaintiff may amend as a matter of course once within a date certain of filing of the initial complaint. RCFC 15(a)(1). After the time for amending as a matter of course has passed, a plaintiff may amend its complaint only with the opposing party's written consent or the court's leave. RCFC 15(a)(2). The rule provides that "[t]he court should freely give leave when justice so requires." *Id.*

Reasons for denying leave to amend pleadings include undue delay, bad faith, dilatory motive, undue prejudice to the non-amending party by allowance of the amendment, futility of amendment, and failure to demonstrate that denial would work an injustice. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Cultor*, 224 F.3d at 1333; *Te-Moak*, 948 F.2d at 1260-61. “It is well established that the grant or denial of an opportunity to amend pleadings is within the discretion of the trial court.” *Mitsui Foods, Inc. v. United States*, 867 F.2d 1401, 1403 (Fed. Cir. 1989).

We agree with KCC that the CFC erred in dismissing the motion to amend as moot.¹⁰ As a procedural matter, it is erroneous to ignore a motion to amend, grant a motion to dismiss, and then deny the motion to amend the complaint as moot. *See, e.g., Pure Country, Inc. v. Sigma Chi Fraternity*, 312 F.3d 952, 956 (8th Cir. 2002).

¹⁰ The United States does not agree with KCC that, in denying the motion as moot, the CFC applied an indispensability analysis to the proposed new claims and “necessarily determined that the restored Tribe claimed a legally protectable interest in the litigation fund.” Br. 55. Had the CFC so determined, it would have found the motion to amend futile, not moot. Whether the claim is in the original complaint or in a proposed amendment to the complaint, a court’s determination that a claim must be dismissed because an indispensable party cannot be joined does not make the claim moot.

But the absence of an analysis by a lower court regarding the interests of justice does not necessarily require a remand, as KCC acknowledges (Br. 55). This Court can affirm the dismissal where a basis for denying the motion is apparent. *See, e.g., Cultor Corp.*, 224 F.3d at 1332-33 (denying motion on basis that amendment would be futile); *Te-Moak*, 948 F.2d at 1260-63 (denying motion on basis that pleading could have been cured earlier and motion was unduly delayed).¹¹ There are alternate grounds for affirming the CFC's dismissal of KCC's motion to amend the complaint, and we urge this Court to affirm the dismissal.

¹¹ In *Cultor*, the lower court had denied the motion to amend without comment. The appellant argued that, at a minimum, an explanation of the lower court's reasons (and therefore a remand) was required. 224 F.3d at 1332. This Court rejected that argument, determined that a basis for denying amendment was apparent, and affirmed. *Id.* at 1333. This Court held that "[f]utility was apparent, and is adequate grounds for the denial of leave to amend." *Id.* Similarly, in *Te-Moak*, this Court denied a motion to amend on a basis not addressed by the Claims Court. 948 F.3d at 1260. This Court found that amendment should not have been allowed because the deficiencies could have been cured earlier (*id.* at 1261-62) and the motion was unduly delayed (*id.* at 1262-63).

A. The motion to amend the complaint to add the second and third new claims should be denied as unduly delayed, futile and otherwise unwarranted.

The second claim alleges a breach of fiduciary duty regarding the so-called Litigation Trust Fund,¹² which KCC states was established in the 1950s. A750-51. KCC asserts that the United States' breach of fiduciary duties

include, but are not limited to:

- (i) failure to provide a full and complete accounting of the Litigation Trust Fund;
- (ii) failure to credit the Litigation Trust Fund for the total amount of income derived from its management;
- (iii) failure to properly record all transactions pertaining to the Litigation Trust Fund;
- (iv) failure to deposit the funds in the Litigation Trust Fund in interest-bearing accounts;
- (v) failure to timely deposit the funds in the Litigation Trust Fund in interest-bearing accounts;
- (vi) holding the funds in the Litigation Trust Fund in its treasury at inadequate interest rates;
- (vii) holding the Litigation Trust Fund in investment paying inadequate interest rates . . .
- (xiv) failing to perform regular and accurate accountings of the Litigation Trust Fund.

A760-61.

¹² In the CFC, the United States referred to this fund as the Litigation Expense Fund, which we continue to believe is a more apt term for the fund. But, for simplicity, here we use KCC's short hand for the fund.

The new proposed third claim alleges mismanagement and underinvestment of the Litigation Trust Fund. A761. The third claim asserts that “[u]pon information and belief, Defendant so invested the monies in the Litigation Trust Fund in breach of its fiduciary obligations and in detriment to the 1954 Membership inasmuch as *at the time the investments were made* other securities or obligations of the same or similar type, guaranteed or secured as required by federal law, were readily available for investment at a higher rate.” A762 (emphasis added). As relief, KCC seeks “a full and complete accounting” of the Litigation Trust Fund to aid in the Court’s determination of damages. A764.

1. KCC unduly delayed in filing these claims.

KCC unduly delayed in seeking to add these claims. KCC asserts (Br. 56) that the facts giving rise to the proposed new claims first came to light in January 2012. But that is plainly incorrect regarding the second and third claims.

These two claims do not involve facts that have come to light in 2012, or since the first amended complaint was filed in 2009. Indeed, according to the facts as alleged by KCC, the Litigation Trust Fund was

established in or around 1958 (A750), was subsequently funded with litigation awards (in the 1960s), had grown to over \$2.8 million by the 1990s, and was partially distributed to the 1954 Members in the 1990s (A751). The proposed second amended complaint does not allege any facts showing that the purported failures and mismanagement at issue occurred after the filing of this suit, let alone that the alleged wrongs commenced in 2012. It alleges that the unlawful conduct occurred “at the time the investments were made.” A762.

KCC could have included these claims in the first amended complaint and has unduly delayed in seeking to add them to this lawsuit. The motion to add the claims should be denied on this basis alone.

Courts have not hesitated to deny motions to amend that have been filed after significant delay. As this Court stated in *Te-Moak*: “Delay alone, even without a demonstration of prejudice, has thus been sufficient grounds to deny amendment of pleadings.” 948 F.2d at 1262. The Court in *Te-Moak (id.)* cited with approval the decision in *Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1164 (5th Cir. 1982), in which the Fifth Circuit found denial of the

motion to amend was a reasonable exercise of discretion in light of the significant delay (27 months from the filing of the original complaint), the fact that the movant failed to cure deficiencies in earlier amendments, and the movant's failure to offer any justification for failing to cure the deficiency earlier where the information had long been available.¹³ As this Court stated in *Te-Moak*, "a point is reached [in the course of the litigation] when the party seeking to amend must justify that request by more than invocation of the concept of the rule's liberality." 948 F.2d at 1263. This Court has adopted the rule that "when, after a significant delay, a party seeks to amend its complaint, the court will place the burden on that party to show a valid reason for the neglect and delay." *Id.*

KCC did not provide any valid reason for the neglect and delay in bringing these two claims. The only basis KCC offered is a change in counsel. But that change occurred years after the first amended

¹³ *Chitimacha*, in turn, cites cases in which delays of 19 months and 16 months weighed against allowing amendment of the complaint. 690 F.2d at 1163 (citing *Jackson v. Columbus Dodge, Inc.*, 676 F.2d 120 (5th Cir. 1982) (19-month delay); *Daly v. Sprague*, 675 F.2d 716 (5th Cir. 1982) (16-month delay); and *Daves v. Payless Cashways, Inc.*, 661 F.2d 1022 (5th Cir. 1981) (19-month delay).

complaint was filed and many months before KCC moved to file the second amended complaint. In any event, as this Court noted in *Te-Moak*, advent of new counsel does not justify endless second thoughts on how to litigate a case. 948 F.2d at 1261. KCC's "failure to have made these claims earlier falls under the 'possibility of earlier curing' apparent exception to Rule 15(a)'s liberal amendment policy." *Id.* at 1262. In addition, KCC has failed to meet its burden of showing the reasonableness of the neglect and delay by prior and current counsel. *Id.* at 1263.

Moreover, while no prejudice to the United States is necessary to support a denial of the motion to amend, allowing amendment here *would* prejudice the United States. The new issues involve claims with different operative facts than those in the original claims, might require additional fact-finding, and would protract this lawsuit. *See Saarstahl AG v. United States*, 177 F.3d 1314, 1320 (Fed. Cir. 1999) (affirming denial of motion to amend because amendment would require gathering new information and a remand to the agency and thereby cause undue delay and unfairly prejudice the other parties); *Tenneco Resins, Inc. v. Reeves Brothers, Inc.*, 752 F.2d 630, 634-35 (Fed. Cir. 1985) (denying

motion to amend where delay was not explained or justified and other party “would suffer prejudice from this amendment because of the need for new discovery”). Thus, denial of the motion is warranted based on timing alone.

2. KCC’s motion to amend to add claims two and three is futile because, *inter alia*, the new claims would not survive a motion to dismiss under RCFC 12(b)(6) and 12(b)(7).

Denial of the motion to amend is also warranted based on futility because claims two and three in the second amended complaint fail to state a claim that would survive a motion to dismiss under RCFC 12(b)(6) and 12(b)(7). KCC’s proposed second amended complaint includes a claim for a breach of fiduciary duty (A760 ¶ 67) and an alleged violation of 25 U.S.C. 162a regarding the investment and management of the Litigation Trust Fund (A762 at ¶¶ 70-71). It states, merely, that: “Upon information and belief, Defendant so invested the monies in the Litigation Trust Fund in breach of its fiduciary obligations and in detriment to the 1954 Membership inasmuch as at the time the investments were made other securities or obligations of the same or similar type, guaranteed or secured as required by federal law, were readily available for investment at a higher rate.” A762 ¶ 71.

The proposed complaint provides no facts in support of that allegation. Nor do these claims, as a matter of law, state a claim that gives rise to a legal remedy because any duty owed by the United States is owed to the Tribes, not to KCC.

A claim must be dismissed under RCFC 12(b)(6) when the facts asserted do not give rise to a legal remedy. *Indian Harbor Ins. Co. v. United States*, – F.3d –, 2013 WL 135736 * 4 (Fed. Cir. 2013). While a complaint does not have to contain detailed factual allegations, it must contain some facts that serve to raise a right of relief above the speculative level. *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009). “[P]laintiff’s obligation to provide ‘the grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” to state a claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The facts must be stated with sufficient specificity to raise a reasonable expectation that discovery will reveal evidence necessary to satisfy the elements of the

alleged offense). *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323 (2011). When a plaintiff only states a mere conclusion without the necessary supporting or primary facts sufficient to allege the essential of a cause of action, the court will dismiss the action as it fails to state a claim. See *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1062 (Fed. Cir. 2012) (dismissing claims because “Plaintiffs failed to allege any specific instances where [the agencies] actually committed the harms alleged in these claims”); see also *Glatt v. Chicago Park District*, 87 F.3d 190, 194 (7th Cir. 1996) (motion to amend or supplement complaint is addressed to the discretion of the court and “requires more to compel acceptance than the fact that the pleading sought to be added states a claim”; the court is “entitled to demand reasons for thinking that the denial of the motion would work a serious injustice”).

KCC’s proposed second amended complaint lacks the requisite factual specificity to survive a motion to dismiss. It makes no allegations about the investments of the account or how the United States did not meet the investment goals for the account. For example, there are no facts about whether the Litigation Trust Fund has been

managed for liquidity or long-term goals. Nor does the proposed complaint include any factual allegations that the Litigation Trust Fund has not been managed to maximize returns or that the investments have failed to meet a benchmark rate, or any relevant dates that might allow the defendant and court to evaluate when any alleged violation occurred and whether or how the statute of limitations applies. A lack of any such factual representations means the proposed second amended complaint would not withstand a motion to dismiss and, therefore, that granting the motion would be futile.

KCC's proposed second amended complaint is also deficient under RCFC 12(b)(6) because, as a matter of law, no accounting or other obligation relating to the fund is owed to KCC. The Litigation Trust Fund is held in trust by the United States for the Tribes, not for KCC or some subset of the Tribes.¹⁴ The United States provides an accounting

¹⁴ See *infra* at 62-63 & n.15. KCC itself has characterized the monies as a set aside from tribal funds. A734 (1958 letter from KCC's lawyer characterizing monies as a set aside from tribal funds); A738 (describing litigation fund as an "important asset of the Tribe"); see also A807 (describing establishment of litigation fund from tribal funds). In 1965, KCC's lawyer characterized the investment of the fund as "being held at 4 percent on the part of the United States which again makes it an attractive proposition for the tribe." Hearings Before the Subcomm. (cont'd)

to the Tribes, not to individual members of the Tribes. Claims regarding the matter are pending in the United States District Court for the District of Columbia. *See Nez Perce v. Salazar*, No. 06-cv-2239 (D.D.C.). Thus, these claims, as well as lacking the requisite factual specificity, also fail to state a claim as a matter of law.

Accordingly, KCC's new claims are inadequate under RCFC 12(b)(6), and granting the motion to amend, therefore, would be futile. In addition, as with the water rights claims, the Tribes is an indispensable party, the claims should not proceed without the Tribes present, and should be dismissed under RCFC 12(b)(7) unless the Tribes agreed to be joined.

When a party faces the possibility of denial based on futility, as KCC did here in light of the United States' opposition to its motion to file a second amended complaint, it must proffer sufficient facts to show the proposed claims would survive a Rule 12(b) motion. *Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro*, 464 F.3d 1339, 1355-56 (Fed. Cir. 2006). But, as in *Kemin*, KCC made no attempt to do so. Nor has

on Indian Affairs on H.R. 907, H.R. 4964 and S.664, 89th Cong. at 35 (1965). Investment of the fund at 4% was consistent with the applicable statute.

KCC shown as to any of the proposed new claims that denial of the motion to amend would work an injustice, because KCC has acknowledged that it could file a new complaint regarding the Litigation Trust Fund, rather than having the claims added to this lawsuit at the eleventh hour.

Thus, even apart from whether the Tribes would be an indispensable party to any claims involving the Litigation Trust Fund – and the United States believes that the Tribes would be – the motion to amend should be denied as untimely, futile and prejudicial.

B. KCC's proposed new claim for a taking and breach of trust regarding payment of attorney fees and costs for this case seeks to supplement, not amend, the complaint, and the denial should be affirmed.

KCC also sought to amend the complaint to add a claim (its first of the three proposed new claims) for a breach of trust and a taking based on the United States' refusal to pay attorney fees and costs incurred in this case, without first obtaining authorization from the Tribes to use the Litigation Trust Fund for that purpose. See A757-59, 764.

Accepting as true KCC's assertion in its motion (A633) and in the second amended complaint (A645-48) – that the facts relevant to this claim for payment of attorney fees out of the Litigation Trust Fund were

not known until “after the Restored Tribe opposed this Action” (A633) in November 2011– KCC’s motion to add this claim should be analyzed under RCFC 15(d) for a motion to supplement a complaint.

Pursuant to RCFC 15(d), “the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.” RCFC 15(d). The standards applicable to dispensation of a motion to amend also apply to a motion to supplement. *Glatt*, 87 F.3d at 193-94. Especially where the motion is filed long after the original complaint, the movant must show more than that the pleading states a claim (*id.* at 194). KCC has failed to do so.

First, this new claim is futile because it fails to state a claim. KCC (and the individual Indians it represents) have no vested right in the Litigation Trust Fund. The Litigation Trust Fund is a tribal asset.¹⁵ It was created from tribal funds in 1958 before the federal/tribal relationship was terminated in 1961 and was supplemented by an

¹⁵ Both the United States and the Tribes understand the Litigation Trust Fund to be a tribal asset, such that disbursement of the funds requires approval by the Tribes. Accordingly, any claims by KCC seeking disbursement of the funds would require analysis under RCFC 19.

award from the Indian Claims Commission in the 1960s. The Indian Claims Commission was “not empowered to hear individuals’ claims, but may only adjudicate claims held by an ‘Indian tribe, band, or other identifiable group.’” *See Del. Tribal Business Comm. v. Weeks*, 430 U.S. 73, 85 (1977) (citing 25 U.S.C. 70a, 70i). An award from the Indian Claims Commission was a “means of compensating that tribal entity” and was “tribal property” in which “individual Indians (hold) no vested rights.” *Id.* Thus, addition of the claim would be futile.

Second, and very significantly, KCC has failed to show – as it must – that denial of the motion would work a serious injustice. *See Glatt*, 87 F.3d at 194. KCC acknowledges that it could file this claim and its other new claims in a new lawsuit.

Third, the addition of this claim (and the other two new claims) would unduly prejudice the federal government and frustrate judicial economy by protracting the litigation, and should be denied on that basis. Where a supplemental pleading relates to the same cause of action originally pleaded, supplementation may be warranted. *See, e.g., Intrepid v. Pollock*, 907 F.2d 1125, 1129-30 (Fed. Cir. 1990). “But pleading is not like playing darts: a plaintiff can’t keep throwing claims

at the board until she gets one that hits the mark.” *Doe v. Howe Military School*, 227 F.3d 981, 990 (7th Cir. 2000). “The court not only may but should consider[:] the likelihood that the new claim is being added in a desperate effort to protract the litigation and complicate the defense; its probable merit; whether the claim could have been added earlier; and the burden on the defendant of having to meet it.” *Glatt*, 87 F.3d at 194 (citing *Foman*).

The gravamen of the new claim is that Interior allegedly must pay KCC’s current lawyer out of the Litigation Trust Fund without first obtaining approval of the Tribes. This claim, like the other two new claims, raises complicated issues about whose interests KCC is representing in making that demand for relief. For example, although KCC’s first amended complaint states that it acts on “behalf of tribal members enrolled at termination,” A50,¹⁶ the proposed new claim for attorney fees appears to put the interests of KCC (whomever it is

¹⁶ In various filings, KCC has asserted that it represents all 1954 Members (all living 1954 Members are members of the Tribes) and their descendants (including descendants who are not members of the Tribes). *See supra* at 12 & n.3. But neither KCC, nor its counsel, have identified the names of individuals who have authorized the claims in this lawsuit.

comprised of) into conflict with a majority of the 1954 Members, who have sought direct payment of a *pro rata* share of the Litigation Trust Fund. KCC's claim also contravenes the Tribes' decisions about use of the fund.

The Tribes has made clear that it believes it has a role – and that KCC does not – in determining how the Litigation Trust Fund should be dispensed. A Klamath Tribes General Council Resolution passed on July 14, 2012, states: (1) the Litigation Trust Fund is held by the United States in the name of the Tribes; and (2) the persons who represent themselves as the KCC “are without authority to utilize or expend funds held in the litigation fund for any purpose, or to bring claims on behalf of the Tribes or any constituent part of the Tribes.” Resolution #2012-002.¹⁷ Resolution 2012-002 also recommended the

¹⁷ The Tribes' General Council Resolutions referenced herein are documents in the public record, of which this Court can take judicial notice. *See Hagana AB v. Dresser Indus., Inc.*, 9 F.3d 948, 954 n. 27 (Fed. Cir. 1993) (appropriate for Court to take judicial notice of publicly accessible document); *Colony Cove Properties, LLC v. City of Carson*, 640 F.3d 948, 954 n.3 (9th Cir. 2011) (taking judicial notice of city council resolution). For the convenience of the Court, the Resolutions are included in the Addendum to this brief. One Resolution has been filed in *Nez Perce*, No. 06-cv-2239 (D.D.C.) (Dkt 196, Exh. 26, filed July 31, 2012); both Resolutions were provided by the Tribes to all counsel in
(*cont'd*)

chartering of a 1954 Final Enrollees Committee, within the tribal government, for purposes of making determinations as to the Litigation Trust Fund. The 1954 Final Enrollees Committee met in August 2012. At that meeting, the 1954 Final Enrollees Committee voted to distribute the Litigation Trust Fund to the 1954 Members and their heirs: 143 For; 5 Opposed; and 2 Abstentions. Resolution #2012-003 at 2. Since then, the Tribes has directed that the Fund be distributed in 2133 shares to the living persons listed on the 1954 Final Roll and to persons legally entitled to distribution as heirs of the deceased persons listed on the Final Roll. Resolution #2012-003 at 2. In this circumstance, there can be little doubt that adding KCC's claim for payment of attorney fees out of the Fund would protract this lawsuit.

In short, the three new claims KCC seeks to add arise out of entirely distinct factual circumstances relating not to the Chiloquin Dam and Treaty reserved water rights, but to management of the Litigation Trust Fund. KCC has not demonstrated that it would be unjust to require that these new claims, particularly one(s) that KCC

this case and are available on the Tribes' website in "Documents related to Tribal Claims" at www.klamathtribes.org/government.html.

asserts had not arisen at the time the extant suit was filed, be brought in a new lawsuit. The new claims raise a tangled web of issues not presented in the prior complaint, are untimely, futile, and should be pursued (if at all) in a separate lawsuit. Dismissal of the motion to amend should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Federal Claims should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH TYPE VOLUME LIMITATION**

This brief complies with the type volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions of the brief described in Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b), the brief contains 13,888 words.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared using Microsoft Word 2007 in a proportionally-spaced typeface using Century Schoolbook, 14-point.

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ADDENDUM

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TREATIES.

Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians: Concluded, October 14, 1864; Ratification advised, with Amendments, July 2, 1866; Amendments assented to, December 10, 1869; Proclaimed, February 17, 1870.

ULYSSES S. GRANT,

PRESIDENT OF THE UNITED STATES OF AMERICA,

Oct. 14, 1864.

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING :

WHEREAS a treaty was made and concluded at Klamath lake, in the State of Oregon, on the fourteenth day of October, in the year of our Lord one thousand eight hundred and sixty-four, by and between J. W. Perit Huntington and William Logan, commissioners on the part of the United States, and La-Lake, Chil-o-que-nas, and other chiefs and headmen of the Klamath tribe of Indians; Schon-chin, Stak-it-ut, and other chiefs and headmen of the Moadoc tribe of Indians, and Kile-to-ak and Sky-te-ock-et, chiefs and headmen of the Yahooskin band of Snake Indians, respectively, on the part of said tribes and band of Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit :

Preamble.

Contracting parties.

Articles of agreement and convention made and concluded at Klamath lake, Oregon, on the fourteenth day of October, A. D. one thousand eight hundred and sixty-four, by J. W. Perit Huntington, superintendent of Indian affairs in Oregon, and William Logan, United States Indian agent for Oregon, on the part of the United States, and the chiefs and headmen of the Klamath and Moadoc tribes, and Yahooskin band of Snake Indians, hereinafter named, to wit : La-Lake, Chil-o-que-nas, Kellogue, Mo-ghen-kas-kit, Blow, Le-lu, Palmer, Jack, Que-as, Poo-sak-sult, Che-mult, No-ak-sum, Mooch-kat-allick, Toon-tuck-te, Boos-ki-you, Ski-a-tic, Shol-las-loos, Ta-tet-pas, Muk-has, Herman-koo-s-mam, chiefs and headmen of the Klamaths, Schon-chin, Stak-it-ut, Keint-poos, Chuck-e-i-ox, chiefs and headmen of the Moadocs, and Kile-to-ak and Sky-te-ock-et, chiefs of the Yahooskin band of Snakes.

ARTICLE I. The tribes of Indians aforesaid cede to the United States all their right, title, and claim to all the country claimed by them, the same being determined by the following boundaries, to wit : Beginning at the point where the forty-fourth parallel of north latitude crosses the summit of the Cascade mountains ; thence following the main dividing ridge of said mountains in a southerly direction to the ridge which separates the waters of Pitt and McCloud rivers from the waters on the north ; thence along said dividing ridge in an easterly direction to the southern end of Goose lake ; thence northeasterly to the northern end of

Cession of lands to the United States. Boundaries.

Add.01

708 TREATY WITH THE KLAMATH, &c. INDIANS. Oct. 14, 1864.

Reservations. Harney lake; thence due north to the forty-fourth parallel of north latitude; thence west to the place of beginning: *Provided*, That the following described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation, to wit: Beginning upon the eastern shore of the middle Klamath lake, at the Point of Rocks, about twelve miles below the mouth of Williamson's river; thence following up said eastern shore to the mouth of Wood river; thence up Wood river to a point one mile north of the bridge at Fort Klamath; thence due east to the summit of the ridge which divides the upper and middle Klamath lakes; thence along said ridge to a point due east of the north end of the upper lake; thence due east, passing the said north end of the upper lake, to the summit of the mountains on the east side of the lake; thence along said mountain to the point where Sprague's river is intersected by the Ish-tish-ea-wax creek; thence in a southerly direction to the summit of the mountain, the extremity of which forms the Point of Rocks; thence along said mountain to the place of beginning. And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes.

Boundaries.

Indians to remove to, and live upon the reservation.

White persons not to remain on reservation;

Post, p. 711.

nor fish, &c.

Right of way for railroads.

Post, p. 711.

Payments by the United States;

how to be expended.

Additional payment, and for what purposes.

Mills and shops to be erected.

It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation, except the Indian superintendent and agent, employes of the Indian department, and officers of the army of the United States, *guaranteed* [and] that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid: *Provided, also*, That the right of way for public roads and railroads across said reservation is *guaranteed* [reserved] to citizens of the United States.

ARTICLE II. In consideration of and in payment for the country ceded by this treaty, the United States agree to pay to the tribes conveying the same the several sums of money hereinafter enumerated, to wit: Eight thousand dollars per annum for a period of five years, commencing on the first day of October, eighteen hundred and sixty-five, or as soon thereafter as this treaty may be ratified; five thousand dollars per annum for the term of five years next succeeding the first period of five years; and three thousand dollars per annum for the term of five years next succeeding the second period; all of which several sums shall be applied to the use and benefit of said Indians by the superintendent or agent having charge of the tribes, under the direction of the President of the United States, who shall, from time to time, in his discretion, determine for what objects the same shall be expended, so as to carry out the design of the expenditure, [it] being to promote the well-being of the Indians, advance them in civilization, and especially agriculture, and to secure their moral improvement and education.

ARTICLE III. The United States agree to pay said Indians the additional sum of thirty-five thousand dollars, a portion whereof shall be used to pay for such articles as may be advanced to them at the time of signing this treaty, and the remainder shall be applied to subsisting the Indians during the first year after their removal to the reservation, the purchase of teams, farming implements, tools, seeds, clothing, and provisions, and for the payment of the necessary employes.

ARTICLE IV. The United States further agree that there shall be erected at suitable points on the reservation, as soon as practicable after the ratification of this treaty, one saw-mill, one flouring-mill, suitable build-

TREATY WITH THE KLAMATH, &c. INDIANS. Oct. 14, 1864. 709

ings for the use of the blacksmith, carpenter, and wagon and plough maker, the necessary buildings for one manual-labor school, and such hospital buildings as may be necessary, which buildings shall be kept in repair at the expense of the United States for the term of twenty years; and it is further stipulated that the necessary tools and material for the saw-mill, flour-mill, carpenter, blacksmith, and wagon and plough maker's shops, and books and stationery for the manual-labor school, shall be furnished by the United States for the period of twenty years.

School-house and hospital.

Tools, books, and stationery.

ARTICLE V. The United States further engage to furnish and pay for the services and subsistence, for the term of fifteen years, of one superintendent of farming operations, one farmer, one blacksmith, one sawyer, one carpenter, and one wagon and plough maker, and for the term of twenty years of one physician, one miller, and two school-teachers.

Farmer, mechanics, and teachers.

ARTICLE VI. The United States may, in their discretion, cause a part or the whole of the reservation provided for in Article I. to be surveyed into tracts and assigned to members of the tribes of Indians, parties to this treaty, or such of them as may appear likely to be benefited by the same, under the following restrictions and limitations, to wit: To each head of a family shall be assigned and granted a tract of not less than forty nor more than one hundred and twenty acres, according to the number of persons in such family; and to each single man above the age of twenty-one years a tract not exceeding forty acres. The Indians to whom these tracts are granted are guaranteed the perpetual possession and use of the tracts thus granted and of the improvements which may be placed thereon; but no Indian shall have the right to alienate or convey any such tract to any person whatsoever, and the same shall be forever exempt from levy, sale, or forfeiture: *Provided,* That the Congress of the United States may hereafter abolish these restrictions and permit the sale of the lands so assigned, if the prosperity of the Indians will be advanced thereby: *And provided further,* If any Indian, to whom an assignment of land has been made, shall refuse to reside upon the tract so assigned for a period of two years, his right to the same shall be deemed forfeited.

Reservation may be surveyed into tracts, and assigned to heads of families and single persons;

not to be alienated, nor subject to levy, &c. Restrictions may be removed.

Forfeiture.

ARTICLE VII. The President of the United States is empowered to declare such rules and regulations as will secure to the family, in case of the death of the head thereof, the use and possession of the tract assigned to him, with the improvements thereon.

Regulations as to successions.

ARTICLE VIII. The annuities of the tribes mentioned in this treaty shall not be held liable or taken to pay the debts of individuals.

Annuities not liable for debts.

ARTICLE IX. The several tribes of Indians, parties to this treaty, acknowledge their dependence upon the government of the United States, and agree to be friendly with all citizens thereof, and to commit no depredations upon the person or property of said citizens, and to refrain from carrying on any war upon other Indian tribes; and they further agree that they will not communicate with or assist any persons or nation hostile to the United States, and, further, that they will submit to and obey all laws and regulations which the United States may prescribe for their government and conduct.

Peace and friendship.

ARTICLE X. It is hereby provided that if any member of these tribes shall drink any spirituous liquor, or bring any such liquor upon the reservation, his or her proportion of the benefits of this treaty may be withheld for such time as the President of the United States may direct.

Members drinking, &c. spirituous liquors, not to have the benefits of this treaty.

ARTICLE XI. It is agreed between the contracting parties that if the United States, at any future time, may desire to locate other tribes upon the reservation provided for in this treaty, no objection shall be made thereto; but the tribes, parties to this treaty, shall not, by such location of other tribes, forfeit any of their rights or privileges guaranteed to them by this treaty.

Other tribes may be located on reservation.

Proviso.

ARTICLE XII. This treaty shall bind the contracting parties whenever the same is ratified by the Senate and President of the United States.

Treaty when to take effect.

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PUBLIC LAW 587—AUG. 13, 1954

[68 STAT.]

Public Law 587

CHAPTER 732

AN ACT

August 13, 1954
[S. 2745]

To provide for the termination of Federal supervision over the property of the Klamath Tribe of Indians located in the State of Oregon and the individual members thereof, and for other purposes.

Klamath Indians,
Termination of
Federal super-
vision.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the purpose of this Act is to provide for the termination of Federal supervision over the trust and restricted property of the Klamath Tribe of Indians consisting of the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians, and of the individual members thereof, for the disposition of federally owned property acquired or withdrawn for the administration of the affairs of said Indians, and for a termination of Federal services furnished such Indians because of their status as Indians.

Definitions.

SEC. 2. For the purposes of this Act:

(a) "Tribe" means the Klamath Tribe of Indians consisting of the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians.

(b) "Secretary" means the Secretary of the Interior.

(c) "Lands" means real property, interests therein, or improvements thereon, and include water rights.

(d) "Tribal property" means any real or personal property, including water rights, or any interest in real or personal property, that belongs to the tribe and either is held by the United States in trust for the tribe or is subject to a restriction against alienation imposed by the United States.

(e) "Adult" means a member of the tribe who has attained the age of twenty-one years.

Tribal roll.

SEC. 3. At midnight of the date of enactment of this Act the roll of the tribe shall be closed and no child born thereafter shall be eligible for enrollment: *Provided*, That the tribe shall have a period of six months from the date of this Act in which to prepare and submit to the Secretary a proposed roll of the members of the tribe living on the date of this Act, which shall be published in the Federal Register. If the tribe fails to submit such roll within the time specified in this section, the Secretary shall prepare a proposed roll for the tribe, which shall be published in the Federal Register. Any person claiming membership rights in the tribe or an interest in its assets, or a representative of the Secretary on behalf of any such person, may, within ninety days from the date of publication of the proposed roll, file an appeal with the Secretary contesting the inclusion or omission of the name of any person on or from such roll. The Secretary shall review such appeals and his decisions thereon shall be final and conclusive. After disposition of all such appeals, the roll of the tribe shall be published in the Federal Register, and such roll shall be final for the purposes of this Act.

Publication in FR.

Appeals.

Final roll. Publication in FR.

Personal property rights.

SEC. 4. Upon publication in the Federal Register of the final roll as provided in section 3 of this Act, the rights or beneficial interests in tribal property of each person whose name appears on the roll shall constitute personal property which may be inherited or bequeathed, but shall not otherwise be subject to alienation or encumbrance before the transfer of title to such tribal property as provided in section 6 of this Act without the approval of the Secretary. Any contract made in violation of this section shall be null and void.

Management specialists. Duties.

SEC. 5. (a) The Secretary is authorized and directed to select and retain by contract, at the earliest practicable time after the enactment of this Act and after consultation with the tribe at a general meeting called for that purpose, the services of qualified management specialists who shall—

Add.04

(1) cause an appraisal to be made, within not more than twelve months after their employment, or as soon thereafter as practicable, of all tribal property showing its fair market value by practicable logging or other appropriate economic units;

(2) give each adult member of the tribe, immediately after the appraisal of the tribal property, an opportunity to elect for himself, and, in the case of a head of a family, for the members of the family who are minors, to withdraw from the tribe and have his interest in tribal property converted into money and paid to him, or to remain in the tribe and participate in the tribal management plan to be prepared pursuant to paragraph (5) of this subsection;

(3) determine and select the portion of the tribal property which if sold at the appraised value would provide sufficient funds to pay the members who elect to have their interests converted into money, arrange for the sale of such property, and distribute the proceeds of sale among the members entitled thereto: *Provided*, That whenever funds have accumulated in the amount of \$200,000 or more, such funds shall be distributed pro rata to the members who elected to take distribution of their individual shares, and thereafter similar pro rata distribution shall be made whenever funds have accumulated in the amount of \$200,000 or more until all of the property set aside for sale shall have been sold and the proceeds distributed: *Provided further*, That any such member shall have the right to purchase any part of such property for not less than the highest offer received by competitive bid, and to apply toward the purchase price all or any part of the sum due him from the conversion of his interest in tribal property: *Provided further*, That when determining and selecting the portion of the tribal property to be sold, due consideration shall be given to the use of such property for grazing purposes by the members of both groups of the tribe;

(4) cause such studies and reports to be made as may be deemed necessary or desirable by the tribe or by the Secretary in connection with the termination of Federal supervision as provided for in this Act; and

(5) cause a plan to be prepared in form and content satisfactory to the tribe and to the Secretary for the management of tribal property through a trustee, corporation, or other legal entity.

(b) Such amounts of Klamath tribal funds as may be required for the purposes of this section shall be available for expenditure by the Secretary: *Provided*, That the expenses incident to the sale of property and the distribution of proceeds of sale pursuant to paragraph (3) of this subsection shall be charged exclusively to the interests of the members who withdraw from the tribe, and the expenses incurred under paragraphs (4) and (5) of this subsection shall be charged exclusively to the interests of the members who remain in the tribe, and all other expenses under this section shall be charged to the interests of both groups of members.

SEC. 6. (a) The Secretary is authorized and directed to execute any conveyancing instrument that is necessary or appropriate to convey title to tribal property to be sold in accordance with the provisions of paragraph (3) of subsection (a) of section 5 of this Act, and to transfer title to all other tribal property to a trustee, corporation, or other legal entity in accordance with the plan prepared pursuant to paragraph (5) of subsection (a) of section 5 of this Act.

(b) It is the intention of the Congress that all of the actions required by sections 5 and 6 of this Act shall be completed at the earliest practicable time and in no event later than four years from the date of this Act.

Expenditures authorized.

Tribal property. Transfer procedure.

Completion date.

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[68 STAT.]

Non-members of
tribe.
Claims.

(c) Members of the tribe who receive the money value of their interests in tribal property shall thereupon cease to be members of the tribe: *Provided*, That nothing shall prevent them from sharing in the proceeds of tribal claims against the United States.

Per capita
payments.

SEC. 7. The Secretary is authorized and directed, as soon as practicable after the passage of this Act, to pay from such funds as are deposited to the credit of the tribe in the Treasury of the United States, \$250 to each member of the tribe on the rolls of the tribe on the date of this Act. Any other person whose application for enrollment on the rolls of the tribe is subsequently approved, pursuant to the terms of section 3 hereof, shall, after enrollment, be paid a like sum of \$250: *Provided*, That such payments shall be made first from the capital reserve fund created by the Act of August 28, 1937 (25 U. S. C., Sec. 530).

50 Stat. 872.

Property of in-
dividuals.

SEC. 8. (a) The Secretary is authorized and directed to transfer within four years from the date of this Act to each member of the tribe unrestricted control of funds or other personal property held in trust for such member by the United States.

Sales restric-
tions, etc.
Removal.

(b) All restrictions on the sale or encumbrance of trust or restricted land owned by members of the tribe (including allottees, heirs, and devisees, either adult or minor) are hereby removed four years after the date of this Act, and the patents or deeds under which titles are then held shall pass the titles in fee simple, subject to any valid encumbrances: *Provided*, That the provisions of this subsection shall not apply to subsurface rights in such lands, and the Secretary is directed to transfer such subsurface rights to one or more trustees designated by him for management for a period not less than ten years. The titles to all interests in trust or restricted land acquired by members of the tribe by devise or inheritance four years or more after the date of this Act shall vest in such members in fee simple, subject to any valid encumbrance.

Land owned by
more than one.

(c) Prior to the time provided in subsection (b) of this section for the removal of restrictions on land owned by more than one member of a tribe, the Secretary may—

Partition.

(1) upon request of any of the owners, partition the land and issue to each owner a patent or deed for his individual share that shall become unrestricted four years from the date of this Act;

Sale.

(2) upon request of any of the owners, and a finding by the Secretary that partition of all or any part of the land is not practicable, cause all or any part of the land to be sold at not less than the appraised value thereof and distribute the proceeds of sale to the owners: *Provided*, That any one or more of the owners may elect before a sale to purchase the other interests in the land at not less than the appraised value thereof, and the purchaser shall receive an unrestricted patent or deed to the land; and

Election to pur-
chase.

(3) if the whereabouts of none of the owners can be ascertained, cause such lands to be sold and deposit the proceeds of sale in the Treasury of the United States for safekeeping.

Unlocated own-
ers.
Deposit of pro-
ceeds.

(d) The Secretary is hereby authorized to approve—

Approval of trib-
al exchanges, etc.

(1) the exchange of trust or restricted land between the tribe and any of its members;

(2) the sale by the tribe of tribal property to individual members of the tribe; and

(3) the exchange of tribal property for real property in fee status. Title to all real property included in any sale or exchange as provided in this subsection shall be conveyed in fee simple.

Deceased mem-
bers.
25 USC 373.

SEC. 9. (a) The Act of June 25, 1910 (36 Stat. 855), the Act of February 14, 1913 (37 Stat. 678), and other Acts amendatory thereto shall not apply to the probate of the trust and restricted property of

Add.06

the members of the tribe who die six months or more after the date of this Act.

(b) The laws of the several States, Territories, possessions, and the District of Columbia with respect to the probate of wills, the determination of heirs, and the administration of decedents' estates shall apply to the individual property of members of the tribe who die six months or more after the date of this Act.

Probate of wills,
etc.

(c) Section 5 of the Act of June 1, 1938 (52 Stat. 605), is hereby repealed.

Repeal.
25 USC 555.

SEC. 10. The Secretary is authorized, in his discretion, to transfer to the tribe or any member or group of members thereof any federally owned property acquired, withdrawn, or used for the administration of the affairs of the tribe which he deems necessary for Indian use, or to transfer to a public or nonprofit body any such property which he deems necessary for public use and from which members of the tribe will derive benefit.

Federal property
disposal.

SEC. 11. No property distributed under the provisions of this Act shall at the time of distribution be subject to Federal or State income tax. Following any distribution of property made under the provisions of this Act, such property and any income derived therefrom by the individual, corporation, or other legal entity shall be subject to the same taxes, State and Federal, as in the case of non-Indians: *Provided*, That, for the purpose of capital gains or losses the base value of the property shall be the value of the property when distributed to the individual, corporation or other legal entity.

Taxes.

SEC. 12. Sections 2, 3, 4, 5, and 6 of the Act of August 28, 1937 (50 Stat. 872, 873), and section 2 (a) of the Act of August 7, 1939 (53 Stat. 1253), are repealed effective on the date of the transfer of title to tribal property to a trustee, corporation, or other legal entity pursuant to section 6 of this Act. All loans made from the reimbursable loan fund established by section 2 of the Act of August 28, 1937 (50 Stat. 872), and all other loans made from Klamath tribal funds, including loans of livestock made by the tribe repayable in kind, shall be transferred to the tribe for collection in accordance with the terms thereof.

Repeals.
25 USC 531-535.
25 USC 542(a).

Loan transfer.
25 USC 531.

SEC. 13. (a) That part of section 5 of the Act of August 13, 1914 (35 Stat. 687; 43 U. S. C. 499), which relates to the transfer of the care, operation, and maintenance of reclamation works to water users associations or irrigation districts shall be applicable to the irrigation works on the Klamath Reservation.

Klamath Reser-
vation irrigation
works.
38 Stat. 687.

(b) Effective on the first day of the calendar year beginning after the date of the proclamation provided for in section 18 of this Act, the deferment of the assessment and collection of construction costs provided for in the first proviso of the Act of July 1, 1932 (47 Stat. 564; 25 U. S. C. 386a), shall terminate with respect to any lands within irrigation projects on the Klamath Reservation. The Secretary shall cause the first lien against such lands created by the Act of March 7, 1928 (45 Stat. 200, 210), to be filed of record in the appropriate county office.

Klamath Reser-
vation irrigation
projects.
Construction
costs, etc.

(c) There is hereby authorized to be appropriated out of any funds in the Treasury not otherwise appropriated the sum of \$89,212 for payment to the Klamath Tribe with interest at 4 per centum annually as reimbursement for tribal funds used for irrigation construction operation and maintenance benefiting nontribal lands on the Klamath Reservation, such interest being computed from the dates of disbursement of such funds from the United States Treasury.

Reimbursement.

(d) The Secretary is authorized to adjust, eliminate, or cancel all or any part of reimbursable irrigation operation and maintenance costs and reimbursable irrigation construction costs chargeable against Indian owned lands that are subject to the provisions of this Act,

and all or any part of assessments heretofore or hereafter imposed on account of such costs, when he determines that the collection thereof would be inequitable or would result in undue hardship on the Indian owner of the land, or that the administrative costs of collection would probably equal or exceed the amount collected.

(e) Nothing contained in any other section of this Act shall affect in any way the laws applicable to irrigation projects on the Klamath Reservation.

Water rights.

SEC. 14. (a) Nothing in this Act shall abrogate any water rights of the tribe and its members, and the laws of the State of Oregon with respect to the abandonment of water rights by nonuse shall not apply to the tribe and its members until fifteen years after the date of the proclamation issued pursuant to section 18 of this Act.

Fishing rights.

(b) Nothing in this Act shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty.

Guardians for minors, etc.

SEC. 15. Prior to the transfer of title to, or the removal of restrictions from, property in accordance with the provisions of this Act, the Secretary shall protect the rights of members of the tribe who are minors, non compos mentis, or in the opinion of the Secretary in need of assistance in conducting their affairs, by causing the appointment of guardians for such members in courts of competent jurisdiction, or by such other means as he may deem adequate.

Advances.

SEC. 16. Pending the completion of the property dispositions provided for in this Act, the funds now on deposit, or hereafter deposited, in the United States Treasury to the credit of the tribe shall be available for advance to the tribe, or for expenditure, for such purposes as may be designated by the governing body of the tribe and approved by the Secretary.

Patents, deeds, etc.

SEC. 17. The Secretary shall have authority to execute such patents, deeds, assignments, releases, certificates, contracts, and other instruments as may be necessary or appropriate to carry out the provisions of this Act, or to establish a marketable and recordable title to any property disposed of pursuant to this Act.

Federal trust termination. Publication in FR.

SEC. 18. (a) Upon removal of Federal restrictions on the property of the tribe and individual members thereof, the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to the affairs of the tribe and its members has terminated. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians and, except as otherwise provided in this Act, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

Citizenship status.

(b) Nothing in this Act shall affect the status of the members of the tribe as citizens of the United States.

Termination of powers.

SEC. 19. Effective on the date of the proclamation provided for in section 18 of this Act, all powers of the Secretary or other officer of the United States to take, review, or approve any action under the constitution and bylaws of the tribe are hereby terminated. Any powers conferred upon the tribe by such constitution which are inconsistent with the provisions of this Act are hereby terminated. Such

PUBLIC LAW 99-398—AUG. 27, 1986

100 STAT. 849

Public Law 99-398
99th Congress

An Act

To provide for the restoration of the Federal trust relationship with, and Federal services and assistance to, the Klamath Tribe of Indians and the individual members thereof consisting of the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians, and for other purposes.

Aug. 27, 1986

[H.R. 3554]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Klamath Indian Tribe Restoration Act”.

Klamath Indian
Tribe
Restoration Act.
Oregon.

25 USC 566 note.

SEC. 2. RESTORATION OF FEDERAL RECOGNITION, RIGHTS, AND PRIVILEGES.

25 USC 566.

(a) **FEDERAL RECOGNITION.**—Notwithstanding any provision of law, Federal recognition is hereby extended to the tribe and to members of the tribe. Except as otherwise provided in this Act, all laws and regulations of the United States of general application to Indians or nations, tribes, or bands of Indians which are not inconsistent with any specific provision of this Act shall be applicable to the tribe and its members.

(b) **RESTORATION OF RIGHTS AND PRIVILEGES.**—All rights and privileges of the tribe and the members of the tribe under any Federal treaty, Executive order, agreement, or statute, or any other Federal authority, which may have been diminished or lost under the Act entitled “An Act to provide for the termination of Federal supervision over the property of the Klamath Tribe of Indians located in the State of Oregon and the individual members thereof, and for other purposes”, approved August 13, 1954 (25 U.S.C. 564 et seq.), are restored, and the provisions of such Act, to the extent that they are inconsistent with this Act, shall be inapplicable to the tribe and to members of the tribe after the date of the enactment of this Act.

(c) **FEDERAL SERVICES AND BENEFITS.**—Notwithstanding any other provision of law, the tribe and its members shall be eligible, on and after the date of the enactment of this Act, for all Federal services and benefits furnished to federally recognized Indian tribes or their members without regard to the existence of a reservation for the tribe. In the case of Federal services available to members of federally recognized Indian tribes residing on or near a reservation, members of the tribe residing in Klamath County shall be deemed to be residing in or near a reservation. Any member residing in Klamath County shall continue to be eligible to receive any such Federal service notwithstanding the establishment of a reservation for the tribe in the future. Notwithstanding any other provision of law, the tribe shall be considered an Indian tribe for the purpose of the “Indian Tribal Government Tax Status Act” (Sec. 7871, I.R.C. 1954).

26 USC 7871.

Add.09

100 STAT. 850

PUBLIC LAW 99-398—AUG. 27, 1986

(d) CERTAIN RIGHTS NOT ALTERED.—Nothing in this Act shall alter any property right or obligation, any contractual right or obligation, or any obligation for taxes already levied.

Oklahoma.
25 USC 861a.

(e) This Act does not apply to the members of the Modoc Indian Tribe of Oklahoma as recognized under section 2(a) of the Act of May 15, 1978 (92 Stat. 246) and the Klamath Tribe of Indians does not (except for the purposes set out in section 2(a)(1) of that Act) include the members of the Modoc Indian Tribe of Oklahoma.

25 USC 566a.

SEC. 3. TRIBE CONSTITUTION AND BYLAWS.

The tribe's Constitution and Bylaws shall remain in full force and effect and nothing in this Act shall affect the power of the General Council to take any action under the Constitution and Bylaws.

25 USC 566b.

SEC. 4. CONSERVATION AND DEVELOPMENT OF LANDS.

(a) IN GENERAL.—Notwithstanding the tribe's previous rejection of the Act of June 18, 1934 (25 U.S.C. 461 et seq.), upon written request of the General Council, the Secretary of the Interior shall conduct a special election pursuant to section 18 of such Act to determine if such Act should be applicable to the tribe.

25 USC 478.

(b) ADOPTION OF CONSTITUTION.—Upon written request of the General Council, the Secretary shall conduct an election pursuant to section 16 of the Act approved on June 18, 1934 (43 Stat. 987; 25 U.S.C. 476), for the purpose of adopting a new constitution for the tribe.

25 USC 566c.

SEC. 5. HUNTING, FISHING, TRAPPING, AND WATER RIGHTS.

Nothing in this Act shall affect in any manner any hunting, fishing, trapping, gathering, or water right of the tribe and its members.

Taxes.
25 USC 566d.

SEC. 6. TRANSFER OF LAND TO BE HELD IN TRUST.

The Secretary shall accept real property for the benefit of the tribe if conveyed or otherwise transferred to the Secretary. Such property shall be subject to all valid existing rights including liens, outstanding taxes (local and State), and mortgages. Subject to the conditions imposed by this section, the land transferred shall be taken in the name of the United States in trust for the tribe and shall be part of their reservation. The transfer of real property authorized by this section shall be exempt from all local, State, and Federal taxation as of the date of transfer.

25 USC 566e.

SEC. 7. CRIMINAL AND CIVIL JURISDICTION.

The State shall exercise criminal and civil jurisdiction within the boundaries of the reservation, in accordance with section 1162 of title 18, United States Code, and section 1360 of title 28, United States Code, respectively.

25 USC 566f.

SEC. 8. ECONOMIC DEVELOPMENT.

(a) PLAN FOR ECONOMIC SELF-SUFFICIENCY.—The Secretary shall—

(1)(A) enter into negotiations with the Executive Committee of the General Council with respect to establishing a plan for economic development for the tribe; and

(B) in accordance with this section and not later than two years after the date of the enactment of this Act, develop such a plan.

State and local governments.

(2) Upon the approval of such plan by the General Council (and after consultation with the State and local officials pursu-

PUBLIC LAW 99-398—AUG. 27, 1986

100 STAT. 851

ant to subsection (b)), the Secretary shall submit such plan to the Congress.

(b) CONSULTATION WITH STATE AND LOCAL OFFICIALS REQUIRED.—To assure that legitimate State and local interests are not prejudiced by the proposed economic self-sufficiency plan, the Secretary shall notify and consult with the appropriate officials of the State and all appropriate local governmental officials in the State. The Secretary shall provide complete information on the proposed plan to such officials, including the restrictions on such proposed plan imposed by subsection (c). During any consultation by the Secretary under this subsection, the Secretary shall provide such information as the Secretary may possess, and shall request comments and additional information on the extent of any State or local service to the tribe.

(c) RESTRICTIONS TO BE CONTAINED IN PLAN.—Any plan developed by the Secretary under subsection (a) shall provide that—

Real property.

(1) any real property transferred by the tribe or any member to the Secretary shall be taken and held in the name of the United States for the benefit of the tribe;

(2) any real property taken in trust by the Secretary pursuant to such plan shall be subject to—

(A) all legal rights and interests in such land existing at the time of the acquisition of such land by the Secretary, including any lien, mortgage, or previously levied and outstanding State or local tax; and

Taxes.

(B) foreclosure or sale in accordance with the laws of the State pursuant to the terms of any valid obligation in existence at the time of the acquisition of such land by the Secretary; and

(3) any real property transferred pursuant to such plan shall be exempt from Federal, State, and local taxation of any kind.

Taxes.

(d) APPENDIX TO PLAN SUBMITTED TO THE CONGRESS.—The Secretary shall append to the plan submitted to the Congress under subsection (a) a detailed statement—

(1) naming each individual and official consulted in accordance with subsection (b);

(2) summarizing the testimony received by the Secretary pursuant to any such consultation; and

(3) including any written comments or reports submitted to the Secretary by any party named in paragraph (1).

SEC. 9. DEFINITIONS.

25 USC 566g.

For the purposes of this Act the following definitions apply:

(1) The term "tribe" means the Klamath Tribe consisting of the Klamath and Modoc Tribes of Oregon and the Yahooskin Band of Snake Indians.

(2) The term "member" means those persons eligible for enrollment under the Constitution and Bylaws of the Klamath Tribe.

(3) The term "Secretary" means the Secretary of the Interior or his designated representative.

(4) The term "State" means the State of Oregon.

(5) The term "Constitution and Bylaws" means the Constitution and Bylaws of the Klamath Tribe of Indians in effect on the date of the enactment of this Act.

(6) The term "General Council" means the governing body of the tribe under the Constitution and Bylaws.

Add.11



The Klamath Tribes
Tribal Council
GENERAL COUNCIL RESOLUTION #2012-002

GENERAL COUNCIL RESOLUTION CLARIFYING OWNERSHIP OF LITIGATION FUNDS AND RECOMMENDING THE CHARTERING A 1954 FINAL ENROLLEES COMMITTEE TO REPRESENT THE INTERESTS OF THE PERSONS ON THE KLAMATH TRIBES 1954 FINAL ROLL FOR PURPOSES OF MAKING DETERMINATIONS AS TO THE "LITIGATION FUND" AND OTHER FUNDS IN WHICH THE 1954 FINAL ROLL MEMBERS HAVE A BENEFICIAL INTEREST DISTINCT FROM THE KLAMATH TRIBES GENERAL MEMBERSHIP AND OTHER MATTERS

- Whereas,** The Klamath Tribes constitute a sovereign nation based on the inherent sovereignty of the Klamath, Modoc and Yahooskin Band of Snake Indians;
- Whereas,** The Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians signed the Treaty of 1864 establishing the Klamath Reservation; and
- Whereas,** The Klamath Indian Tribes Restoration Act of August 27, 1986 (P.L. 99-398) restored to federal recognition the Klamath Tribes; and
- Whereas,** The General Council of the Klamath Tribal membership is the governing body of the Tribes, by the authority of the Constitution of the Klamath Tribes (Article VI, & VII, Section IV E) as approved and/or adopted by the General Council amended on November 19, 2011; and
- Whereas,** The Klamath Tribes Tribal Council is the elected governmental body of the Tribes and has been delegated the authority to direct the day-to-day business and governmental affairs of the Klamath Tribes under the guidance of the General Council (Constitution, Article VII, Section I; Tribal Council By-laws, Article I); and
- Whereas,** The Klamath Tribes is a federally recognized Indian Tribe with a government-to-government relationship with the United States of America; and



- Whereas,** In 1958, Klamath Tribal funds in the amount of \$350,000 were set aside for the purpose of providing a reserve of funds for prosecution of the Klamath claims against the United States (referred to as a "litigation fund"); and
- Whereas,** The litigation fund has been replenished in 1982 with funds that would otherwise have been distributed to members of the 1954 Final Roll as a result of a judgment distribution; and
- Whereas,** The Klamath Tribes does not claim any beneficial right to the funds in the litigation fund held by the United States in the name of the Tribes and believes that those funds properly belong to the 1954 Final Enrollees; and
- Whereas,** Persons who are members of the Klamath Tribes and represent themselves to be the "Claims Committee" or "Klamath Claims Committee" are seeking to utilize the funds in the litigation fund to pay attorney fees and other costs related to litigation initiated by the Claims Committee; and
- Whereas,** The persons who represent themselves as the "Claims Committee" or "Klamath Claims Committee" are without authority to utilize or expend funds held in the litigation fund for any purpose, or to bring claims on behalf of the Tribes or any constituent part of the Tribes; and
- Whereas,** The duly elected and appointed committees and boards of the Tribes, and the Tribes' elected officers are the only legitimate bodies or persons that have authority to speak on behalf of or represent the Tribes or any of its constituent parts; and
- Whereas,** The individuals representing themselves as the Klamath Claims Committee are not an elected or appointed committee of the Tribes and are without any authority to represent the Tribes, or any constituent part of the Tribes; and
- Whereas,** The General Council has determined that it is in the best interest of the Klamath Tribes to charter a 1954 Final Enrollees Committee for the purpose of providing the 1954 Final Enrollees with an organizational capability to speak on behalf of that constituent part of the Tribes, including determining matters relating to the litigation fund;

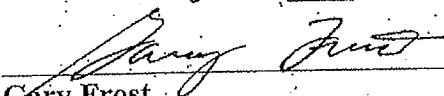
Now therefore be it Resolved, That it is the position of the Klamath Tribes General Council that the funds held in the "litigation fund" and any interest therefrom are owned by a constituent part of the Klamath Tribes, the 1954 Final Enrollees;

Be it further Resolved, That the Klamath Tribes General Council recommends that the Klamath Tribes Chairman charter a 1954 Final Enrollees Committee pursuant to his authority under Article X, Section IV of the Constitution of the Klamath Tribes to be established for the purpose of giving direction 1) relating to the litigation fund, including, but not limited to approving

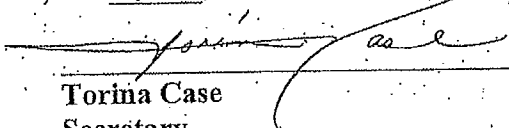
disbursement of such funds, and 2) expressing support for the representation of the interests of the 1954 members in the *Nez Perce Tribe v. Salazar* proceeding.

Certification

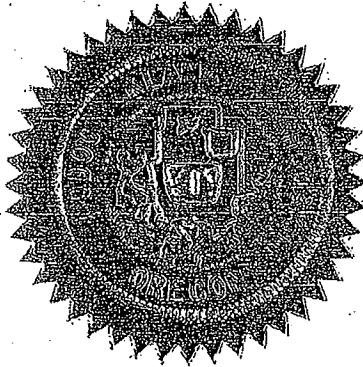
We, the undersigned, Tribal Council Chairman and Secretary of the Klamath Tribes, do hereby certify that at a scheduled General Council meeting held on the 14th day of July, 2012, the General Council duly adopted this resolution by a vote of 91 for, 0 opposed, and 2 abstentions.

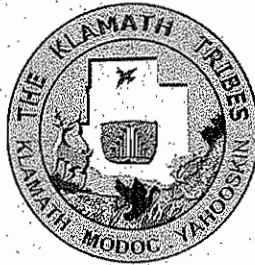


Gary Frost
Chairman
The Klamath Tribes



Torina Case
Secretary
The Klamath Tribes





The Klamath Tribes Tribal Council

GENERAL COUNCIL RESOLUTION #2012-003

GENERAL COUNCIL RESOLUTION RECOGNIZING THE 1954 FINAL ENROLLEES COMMITTEE REQUEST TO DISTRIBUTE THE MONIES HELD IN THE LITIGATION FUND TO PERSONS LISTED ON THE KLAMATH TRIBE 1954 FINAL ROLL, AND AUTHORIZING DISTRIBUTION OF SAME TO ALL LIVING PERSONS LISTED ON THE KLAMATH TRIBES 1954 FINAL ROLL AND TO THOSE LEGALLY ENTITLED TO DISTRIBUTION AS HEIRS OF DECEASED PERSONS LISTED ON THE FINAL ROLL

- Whereas,** The Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians signed the Treaty of 1864 establishing the Klamath Reservation; and
- Whereas,** The General Council of the Klamath membership is the governing body of the Tribes, by the authority of the Constitution of the Klamath Tribes (Article VI, & VII, Section IV E) as approved and/or adopted by the General Council amended on November 19, 2011; and
- Whereas,** The Klamath Indian Tribe Restoration Act of August 27, 1986 (P.L. 99-398) restored to federal recognition the Sovereign Government of the Tribes' Constitution and By-laws; and
- Whereas,** In 1958, Klamath Tribal funds in the amount of \$350,000 were set aside by the Executive Committee of the Tribe for the purpose of providing a reserve of funds for prosecution of the Klamath Tribes' claims against the United States (referred to as a "litigation fund"); and
- Whereas,** The litigation fund has been replenished with interest on the account, loans, and funds that were set aside prior to distribution pursuant to 25 U.S.C. §565; and
- Whereas,** The 1954 Final Enrollees Committee was created pursuant to the Constitution and By-Laws of the Klamath Tribes, and is constituted of all of the living members

GCR 2012-003

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Add.15

listed on the 1954 Klamath Tribe Final Roll, and held a meeting on August 4, 2012, which was noticed by mail to all enrolled members of the Klamath Tribes at their current address on file with the Klamath Tribes Member Benefits Department and was posted in public places; and

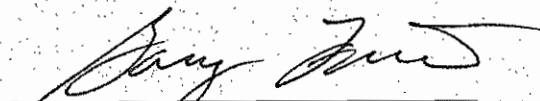
Whereas, At the August 4, 2012 1954 Final Enrollees Committee meeting a motion was passed "to distribute the Litigation Funds to the 1954 members on the final roll" with a vote of 143 For, 5 Opposed, and 2 Abstentions. This motion was voted on only by persons listed on the Klamath Tribe 1954 Final Roll in attendance at the meeting; and

Whereas, The Klamath Tribes General Council has determined that it is in the best interest of the Klamath Tribes to take action consistent with the wishes clearly expressed by the vote of the 1954 Final Enrollees in distributing the funds held in the litigation fund.

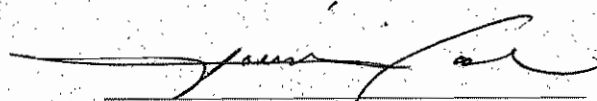
Now therefore be it Resolved, In consideration of the motion passed by the 1954 Final Enrollees Committee at the August 4, 2012 meeting, the General Council directs that the Tribal Council take action as necessary to distribute the funds held in the Litigation Fund in 2133 shares to the living persons listed on the Klamath Tribe 1954 Final Roll and to those persons legally entitled to distribution as heirs of the deceased persons listed on the Final Roll.

Certification

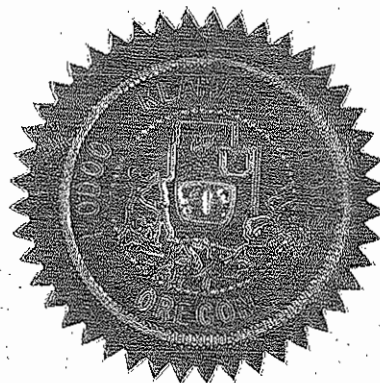
We, the undersigned, Tribal Council Chairman and Secretary of the Klamath Tribes, do hereby certify that at a Regularly scheduled General Council meeting held on the 17th day of November, 2012, the General Council duly adopted this resolution by a vote of 34 for, 5 opposed, and 5 abstentions.



Gary Frost
Chairman
The Klamath Tribes



Torina Case
Secretary
The Klamath Tribes



United States Code Annotated
Rules of the United States Court of Federal Claims (Refs & Annos)
Title III. Pleadings and Motions

RCFC Rule 15

Rule 15. Amended and Supplemental Pleadings

Currentness

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleadings once as a matter of course within:

(A) 21 days after service of the pleading; or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under [RCFC 12\(b\)](#), [\(e\)](#), or [\(f\)](#), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) Based on an Objection at Trial. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move--at any time, even after judgment--to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if RCFC 15(c)(1)(B) is satisfied and if the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) **Notice to the United States.** [Not Used.]

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Credits

(As revised and reissued May 1, 2002; as amended Nov. 3, 2008, Jan. 11, 2010, July 15, 2011.)

Editors' Notes

RULES COMMITTEE NOTES

2002 Revision

Significant changes were made to [FRCP 15](#) in 1991; minor changes were made in 1993. Most notable is the listing of criteria for relation back of amendments in subdivision (c). RCFC 15 was conformed to the comparable FRCP, with two exceptions: first, the language in FRCP subdivision (c)(3), relating to the timing of an amendment changing the name of a party, was omitted as inapplicable; and second, language in subdivision (c) of the FRCP, relating to faulty service on federal officers, also was omitted.

2008 Amendment

The language of RCFC 15 has been amended to conform to the general restyling of the FRCP.

2010 Amendment

RCFC 15(a) has been amended in accordance with the corresponding changes to [FRCP 15\(a\)](#) that became effective December 1, 2009.

United States Code Annotated
Rules of the United States Court of Federal Claims (Refs & Annos)
Title IV. Parties

RCFC Rule 19

Rule 19. Required Joinder of Parties

Currentness

(a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) Joinder by Court Order. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) Venue. [Not used.]

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgement rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) **Pleading the Reasons for Nonjoinder.** When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) **Exception for Class Actions.** This rule is subject to [RCFC 23](#).

Credits

(As revised and reissued May 1, 2002; as amended Nov. 3, 2008.)

Editors' Notes

RULES COMMITTEE NOTES

2002 Revision

Reference to [RCFC 14](#) was deleted from subdivision (a) and other minor changes have been made in order to more closely conform to [FRCP 19](#). Some differences, however, were retained--the most significant being the deletion of the last sentence of [FRCP 19\(a\)](#) from this court's rule. The last sentence addresses objections to venue raised by a joined party. Such objections would not be assertable in this court.

2008 Amendment

The language of RCFC 19 has been amended to conform to the general restyling of the FRCP.

[Notes of Decisions \(20\)](#)

RCFC Rule 19, 28 U.S.C.A., FCL CT Rule 19
Amendments received to 11-1-12

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2013, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Katherine W. Hazard

KATHERINE W. HAZARD

Attorney, Appellate Section

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